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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~302~~. 25

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

DUANE O. ROSS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 24, 1881.

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INDEX.

	ORIGINAL.	PRINT.
Writ of error	1	1
Return to writ of error	2	1
Citation	3	2
Complaint	4	2
Summons	20	8
Return	22	9
Answer	23	9
Trial	31	13
Verdict of jury	33	14
Charge of Court	35	14
Bill of costs	38	19
Bill of exceptions	40	21
Judgment	68	31
Assignment of errors	70	32

1 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the judges of the Circuit Court of the United States for the district of Minnesota, greeting:

Because in the record and proceeding, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Duane O. Ross, plaintiff, and the Chicago, Milwaukee & Saint Paul Railway Company, a manifest error hath happened, to the great damage of the said defendant, as is said; we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, chief justice of the Supreme Court of the United States, this twenty-first day of August, in the year of our Lord one thousand eight hundred and eighty-one, and of the independence of the United States the one hundred and sixth.

H. E. MANN,
[SEAL.] *Clerk of the Circuit Court of the United States of America for the district of Minnesota.*

2 UNITED STATES OF AMERICA,
District of Minnesota, } *ss.*

The Answer of the Judges of the Circuit Court of the United States for the district of Minnesota, in the eighth circuit, in within Writ mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States of America, within mentioned, in a certain schedule to this writ annexed, Schedule A, as within it is commanded.

Witness the Hon. Morrison R. Waite, chief justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this 8th day of September, in the year of our Lord one thousand eight hundred and eighty-one, and of the independence of the United States the one hundred and sixth year.

H. E. MANN,
[SEAL.] *U. S. Circuit Court, dist. of Minnesota.*

(Endorsed:) The United States Supreme Court; the Chicago, Milwaukee and Saint Paul Railway Company, plaintiff in error, *vs.* Duane O. Ross, defendant in error; filed Sept. 1, 1881; H. E. Mann, clerk U. S. Circuit Court, dist. of Minnesota.

3 UNITED STATES OF AMERICA, *ss.*

To Duane O. Ross, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the district of Minnesota, wherein the Chicago, Milwaukee and Saint Paul Railway Company is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated this 31st day of August, A. D. 1881.

R. R. NELSON,
Judge.

(Endorsed:) United States Circuit Court, district of Minnesota; Duane O. Ross *vs.* The Chicago, Milwaukee & St. Paul Railway Co.; citation; due service of the within citation is hereby admitted this 1st day of September, A. D. 1881; C. K. Davis, attorney for plaintiff.

4 *Schedule A.*

United States Circuit Court, district of Minnesota.

Duane O. Ross, plaintiff,
against
The Chicago, Milwaukee and St. Paul Railway Company, defendant.

The plaintiff in this his complaint avers:

That for more than one year last past he has been and now is a citizen of the state of Minnesota, and the defendant is a corporation created by and organized and existing under the laws of the state of Wisconsin, and is a citizen of said state, and exists, owns, and operates a line of railroad in Minnesota, and has a legal and recognized existence within the state of Minnesota under the laws thereof, and exercises its corporate power, rights, and privileges therein by the consent of said state, and has many general officers therein resident for the purposes of its said business.

The plaintiff further avers that ever since the year 1866 he has been a skilled and proficient railroad locomotive engineer, constantly employed as such until on or about November 6, A. D. 1880,
5 and wholly dependent on the exercise of such vocation to earn a livelihood for himself and family, and that he has no other

trade or vocation, and that until he was injured as hereinafter stated he was sound and vigorous in mind and body.

He further avers that about one year before the occurrence of the events hereinafter stated he was employed by the defendant in the state of Minnesota to operate for certain wages a locomotive engine on its said line of railroad in Minnesota, and so remained until he was injured as hereinafter stated, at a certain rate of compensation which the said defendant agreed to pay him; that by such agreement and in consideration of the defendant so entering and remaining in the service of the defendant, the defendant undertook, promised, agreed, and became bound to this plaintiff to furnish and maintain a safe and proper railroad, and to keep the same in a safe and proper condition and repair, and to furnish and maintain safe and proper machinery, engines, cars, and all other appliances incident to the operation of the said railroad, and to keep the same in a safe and proper
condition and in good repair, and to employ and keep in its
6 employ competent and diligent and experienced fellow serv-
ants to this plaintiff, and to see that the same were free from negligence and competent and experienced in all respects, and not to retain in its employment any incompetent, negligent, or unskillful fellow servant to this plaintiff, and to discharge from its employment any such servant of whose incompetence, negligence, or unskillfulness it had notice, or of whose incompetence, negligence, or unskillfulness it might have notice by the exercise of due diligence, and in the above and all other respects not to subject this plaintiff to any extraordinary hazards in the course of his aforesaid duty or employment.

The plaintiff further avers that on or about the 6th day of November, 1880, he was the engineer of a certain regular freight train of the defendant run and operated on its line of road leading out of Minneapolis towards and beyond Hastings, in said state, which train always left Minneapolis in the morning at the regular schedule time of 1.15 o'clock a. m., and had the right of the road over such trains as
the one with which came it into collision as hereinafter stated,
7 except when the conductor of this plaintiff's train and this
plaintiff were otherwise notified and directed by the defendant.

He further avers that one Hugh McClintock was then and there the defendant's conductor of said regular train, employed by it therefor, and has been in the employment of the defendant as a conductor for a long time, and that it was his duty to have entire charge of the running of the same, and that it was especially his duty to carry and exhibit to this plaintiff, as the engineer thereof, any and all orders which he, said McClintock, might receive in regard to the running and operating said train, and especially all orders by which said train was required to wait for other trains; and it was also his duty to cause his said train to stop and wait at the proper places for such other trains and to give to this plaintiff the necessary orders and signals to that end; that in such cases whenever such orders were given at all by the defendant they were given solely to the said McClintock, whose duty it was to inform the plaintiff thereof.

He further avers that before and at the hour when the train
8 so in charge of the said McClintock was required by its time
to leave Minneapolis, and when it did leave Minneapolis, there was coming toward Minneapolis, by order of the defendant, *or* the defendant then and there well knew a "wild" train—that is, a train departing, arriving and running on no schedule time, and in the course of no regular trip; that the same was a gravel train and was known by the defendant to be coming toward Minneapolis from Fort Snelling on and over the same track upon which the train of this plaintiff was to run and did run, and that of none of the aforesaid facts did this plaintiff have any notice or knowledge whatever until the occurrence of the casualty hereafter alleged.

He further avers that with the aforesaid knowledge, the defendant, by telegram or special notice at Minneapolis, ordered the said McClintock to hold his said train at South Minneapolis (a place between Minneapolis and the place where the said casualty occurred) until the said gravel train arrived at South Minneapolis, and that the said McClintock received said order and informed the defendant that he understood the same on or before his said train left Minneapolis.

He further avers, that at the same time the defendant notified
9 the said conductor of the said gravel train to come on to South
Minneapolis regardless of the plaintiff's train.

He further avers that all and singular the above were telegraphs and special orders, and that it was intended by the defendant in the premises in that special instance to cause the train of this plaintiff to be run by telegraph & special orders in the above respect, all of which were then and there well known to the defendant and said McClintock, but never to this plaintiff.

He further avers that there was at that time a rule or regulation of the said defendant in force relative to the running of trains, as is in substance as follows:

"Conductors must in all cases, while running by telegraph & special orders, show the same to the engineer of their train before leaving stations where the orders are received. The engineer must read and understand the order before leaving the station." "The conductor will have charge and control of the train, and of all persons employed on it, and is responsible for its movements while on the road except when his directions conflict with these regulations or involve any risk or hazard, in which case the engineer will also be held accountable."

10 And the plaintiff avers that his said train was a regular
train, and never, except in rare exceptional instances, of which the above was one, ran by telegraph or special orders, and that it was the duty of the defendant and of the said conductor to show him or notify him of such telegraph or special orders before his said train left Minneapolis, and he avers that had the same been done said casualty would never have happened.

And he further avers that the said McClintock, through gross negligence and incompetency, never showed him any of said telegrams or special orders or notified of their contents or existence, or notified or directed him that his said train was to stop at South Minneapolis at all; and he avers that defendant also failed through its gross negligence in hiring and retaining in its employment the said conductor McClintock, as elsewhere in this complaint is more fully stated, after notice of the negligent habits, character and acts of the said McClintock as a conductor, and otherwise negligently failed to show to this plaintiff any of said telegrams or orders or to notify him of their existence, or to give him any directions whatever in the premises at any time. 11

And he avers that he never had any knowledge or notice whatever from any source of such telegram or order, or that it was intended that his said train should stop at South Minneapolis and wait there for said gravel train, or that said gravel train was approaching, or that said plaintiff's train was to be run in any manner other than it was run (the same being the usual and regular manner as he avers), or of any fact or circumstance which would warn or tend to warn him of the danger of the said situation or trip, and he avers that in all the defendant did or omitted to do in the premises stated in his complaint, it committed gross negligence and violated all its obligations to this plaintiff.

He further avers that at or about the regular schedule time for his train to leave Minneapolis, he was ordered by the defendant, who then well knew the danger to which it was subjecting this plaintiff, to put his engine in operation and to start on said trip, and that he then and there did so in obedience to such order, and that he never received or had any other order or notice whatever in the premises.

12 He further avers that while proceeding on his said regular trip the said train passed South Minneapolis without stopping, and that the said conductor and said defendant negligently failed to signal or give him any other order whatever to stop or to remain there, or gave him any other signal, notice, or order whatever, and he further avers that under the above facts and circumstances he proceeded with his said train from South Minneapolis to the place where the said casualty happened, and that in all that he did in the premises he exercised the greatest care and diligence.

He further avers that the said gravel train then and there proceeded toward Minneapolis on the same track with this plaintiff's train, and this plaintiff's train proceeded toward the said gravel train in the night until about three o'clock in the morning, until they came to and into a section of the said railroad line between South Minneapolis and Fort Snelling, known as the "rock cut," the same being a very dangerous and unsafe portion of the defendant's said road, and which cut is from ten to twelve feet deep and about fifteen feet wide in the solid rock, and is so curved that an approaching train can be seen or heard but for a short and dangerous distance,

especially in the night; that the grade through such cut is at
13 least fifty feet to the mile, and that this plaintiff's train was
going down said grade at a proper and prudent rate of speed, and at the same time the said gravel train was coming up said grade through said cut.

And he further avers that the first knowledge or notice he had of the said gravel train was when it was so near his engine that a collision could not be avoided, and that immediately upon discovering such train he whistled for brakes, reversed his engine, and took all other means to avert or alleviate the casualty, and that while he was doing so the said engines and trains came into collision with great force and violence and totally wrecked and smashed both said engines and heaped them up on one another.

He avers that by reason of the facts and circumstances herein detailed and hereinafter stated, he was grievously hurt, and that the following are some of the injuries which he then, there, and thereby received, to wit: his left wrist was broken at the joint and was thereby permanently stiffened and made useless; two of his left ribs were driven in and broken; one right rib was pulled out or loosened
from its attachment to the back bone; his chest was smashed
14 in on the right side; he received a large cut eight or
ten inches long in the back which exposed the ribs and spine; his left hip was contused so badly as to make him permanently and incurably lame; he received a long cut in the side of his face which has left an ugly, permanent and discolored scar; his right eye was so injured that at times he cannot see with it at all and it is getting worse; both of his eyes were so injured that he cannot read at night; the sense of hearing of his right ear was so far destroyed that he cannot hear ordinary conversation with the same; his powers of attention and memory have been injuriously effected; two of his teeth were split and broken, and his nervous system has been incurably injured, and he was otherwise grievously injured in body, mind and faculties, and he will always be unable to follow his aforesaid vocation of an engineer, or any other remunerative employment.

He further avers that shortly after he received the said injuries he was discharged by the said defendant from its employment for no fault of his, but for the sole reason that he became disabled and
useless by reason of the premises herein set forth, and that he
15 has not been able to obtain and cannot obtain any employ-
ment whatever.

He further avers that the said McClintock was always a negligent, unskillful, and improper person to be employed as conductor, or in any other employment incident to the operation of a railroad, as the defendant well knew when it hired him, and always well knew down to the time of the aforesaid casualty.

He avers that while the said McClintock was in the employ of the defendant as such conductor he was habitually negligent, as the defendant always well knew and had repeated notice in running and

operating trains under his charge; that many times, and in several instances not long before the said casualty, he, the said McClintock, in managing and running trains of the defendant under his charge as conductor, and while in its employment as such conductor, was guilty of gross and repeated acts of negligence in managing and running such trains as to result in danger and destruction to life and property on such trains, of which habitual negligence, and of which specific acts of negligence the defendant had actual knewledge and notice long before the happening of the casualty by which this plaintiff was injured; and he avers that with and after such knowl-
16 edge and notice the defendant refused and neglected to discharge the said McClintock, or to withdraw him from service as a conductor, but persisted in retaining him in its employment as a conductor, with full knowledge and notice as aforesaid, to the manifest peril of the public, and of all persons in the employment of the defendant, and to the eventual injury of this plaintiff in manner and form as above stated.

He further avers that the cut in which the said casualty happened was a dangerous and unsafe place, as the defendant always well knew, and that the defendant negligently omitted to keep the same guarded, or to provide any means by which the plaintiff could be warned of the dangers, facts, and circumstances which resulted in his aforesaid injuries.

He further avers that his aforesaid injuries were caused solely by the negligences, acts, and omissions of the defendant stated in this complaint, and particularly by the negligence of the defendant in employing and retaining in its employment the said McClintock as a conductor, with and after knowledge and notice of his said incompetency, carelessness, habitual negligence, and said acts of specific negligence.

He avers that by reason of the aforesaid premises he has
17 suffered damage in mind and body in the sum of twenty thousand dollars, besides the special damage heretofore claimed, and has expended or incurred expense in the sum of one hundred and twenty-four dollars for surgical attendance and medicines.

He further avers that at the time he was so injured he was earning, in his said vocation as locomotive engineer, wages at the rate of $3.40 per day; that his services were worth such sum and would, as he is informed and believes, been worth such sum per day for such portion of the remainder of his life as he would have been able to work at such employment, and that he could have obtained employment for such time and such wages had he not been disabled as aforesaid. He further avers that at the time when he was so as aforesaid injured his expectation of life was twenty-seven years and six months, and that for at least ten years of such time he could and would have worked at his vocation as such locomotive engineer and earned and received therefore wages at the rate aforesaid for such time but for the aforesaid acts, omissions and negligences of the defendant, which have wholly and permanently disabled and incapac-

itated him from ever hereafter at all pursuing his aforesaid
18 vocation or any other remunerative employment, and have disabled him for life from all employment, to his special damage in the sum of ten thousand dollars, which damage he sets up as a special damage in addition to the amount hereinbefore claimed.

Wherefore he demands judgment against the said defendant in the sum of thirty thousand one hundred and twenty-five dollars and costs.

C. K. DAVIS,
Pl'ff's, Att'y,
St. Paul, Minn.

19 STATE OF MINNESOTA,
County of Ramsey, } *ss.*

C. K. Davis came before me personally, and being duly sworn, doth say that he is the plaintiff's attorney in the above-entitled action; that the foregoing complaint is true to the best of his knowledge, information, and belief, and that the reason why this verification is not made by this plaintiff is that said plaintiff is absent from the county of Ramsey, Minnesota, where resides this affiant, the plaintiff's attorney.

C. K. DAVIS.

Subscribed and sworn to before me this 4th day of April, A. D. 1881.

[NOTARIAL SEAL.] SAMUEL MORRISON,
Notary Public Ramsey Co., Minn.

(Endorsed:) United States Circuit Court, Minnesota district. Duane O. Ross, pl'ff, against the Chicago, Milwaukee & St. Paul R'y Co., def't. Complaint. Filed April 4th, 1881. H. E. Mann, clerk. C. K. Davis, plaintiff's attorney, St. Paul, Minn.

20 UNITED STATES OF AMERICA,
District of Minnesota, } *ss.*

In the Circuit Court of the United States for the district of Minnesota.

Duane O. Ross
against
The Chicago, Milwaukee and St. Paul Railway Company. } Summons.

The President of the United States of America to the defendant above named, greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this court, in Saint Paul, county of Ramsey and state of Minnesota, and file your answer in said clerk's office within twenty days after the service hereof, excluding the day of such service, and if you fail to answer the complaint as aforesaid the plaintiff will take judgment against you for the sum of thirty thousand one hundred and twenty-four dollars, besides the costs and disbursements of this action.

For the marshal of the district of Minnesota to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in said district of Minnesota, this fourth day of April, in the year of our Lord one thousand eight hundred and eighty-one, and of our Independence one hundred and fifth year.

[CIRCUIT CT. SEAL.] H. E. MANN, *Clerk.*

C. K. DAVIS,
Plaintiff's Attorney.

21 (Endorsed:) United States Circuit Court, district of Minnesota; No. ; Duane O. Ross, plaintiff, *vs.* Chicago, Milwaukee & St. Paul R'y Co., defendant; summons; filed April 18th, 1881; H. E. Mann, clerk; C. K. Davis, plaintiff's attorney.

22 UNITED STATES OF AMERICA, } *ss.*
District of Minnesota, }

I hereby certify that I served the annexed summons on the therein-named defendant, The Chicago, Milwaukee & St. Paul Railway Co., on C. H. Prior, general superintendent of Minnesota division of said railroad company, personally, by handing to and leaving with him a true copy thereof at Minneapolis, in said district, the same being the place where the general office of said company for Minnesota is located, on the 9th day of Ap'l, 1881,

R. N. McLAREN,
U. S. Marshal.
By A. B. BRACKETT,
Deputy.

U. S. M. fees and expenses, $4.90.

23 Circuit Court of the United States, district of Minnesota.

Duane O. Ross
against
The Chicago. Milwaukee and St. Paul
Railway Company.

The defendant, answering the complaint in the above-entitled action, avers that as to whether plaintiff, during the time alleged in said complaint, was a skilled and proficient railroad locomotive engineer and constantly employed as such until on or about the 6th day of November, A. D. 1880, and as to how long he has been a skilled and proficient railroad locomotive engineer, and as to how long and to what extent he has been employed as such, and as to whether, during the time mentioned or any part thereof, he has been wholly dependent upon the exercise of such vocation to earn a livelihood for himself and family, and as to whether he has no other trade or vocation, and as to whether, during the time mentioned and as to what portion of said time, he was sound and vigorous in mind and body, and as to each of said matters defendant has no knowledge or information thereof sufficient to form a belief.

The defendant admits that, at the time alleged in said com-
24 plaint, it employed plaintiff to operate a locomotive engine upon its line of railroad at a certain rate of compensation, which defendant then agreed to pay to plaintiff, and it avers that said compensation was the sole consideration for said contract of employment, and defendant denies that it then or at any time undertook, promised, agreed, or became bound to plaintiff for the performance of or in respect to any of the acts, matters, or things alleged in said complaint as a consideration for plaintiff's entering and remaining in defendant's service, save only as above admitted.

The defendant admits that it was the duty of the conductor of the train upon which plaintiff was employed as engineer to show or notify plaintiff in respect to the telegrams or special orders which the said conductor might receive in regard to the running, operating, and waiting of said train, and to give to plaintiff the necessary orders in relation thereto; but it denies that such was the duty of the defendant, and it avers that defendant performed its whole duty in the premises upon giving such telegrams or special orders to said conductor.

The defendant denies that it ever ordered plaintiff to put his engine in operation and start upon the trip mentioned in said com-
25 plaint, and it denies that at any time prior to the casualty mentioned in said complaint it knew of or had any reason to apprehend any danger to plaintiff by reason of his starting thereon, and it avers that it had no knowledge, information, or reason to believe that the conductor aforesaid had not exhibited to the plaintiff or made known to him the nature and contents of the special orders above referred to, or that said conductor had in any way failed to perform his whole duty. But as to whether said casualty would not *of* happened if plaintiff had been shown or notified of said telegrams or special orders, defendant avers that it has no knowledge or information thereof sufficient to form a belief.

As to whether plaintiff at any time prior to the said casualty knew or did not know that the "wild train" described in said complaint was coming from Fort Snelling towards Minneapolis on and over the same track upon which the train of plaintiff was to run and did run, and as to whether said conductor failed to give plaintiff any signal, notice or order to stop at South Minneapolis, and as to whether plaintiff upon discovering said "wild train" whistled for brakes, reversed his engine, or took other means to avert or alleviate said casualty, and as to whether plaintiff in respect to the matters alleged in

said complaint or any of them exercised care and diligence,
26 and as to each of said matters defendant avers that it has no
knowledge or information thereof sufficient to form a belief.

The defendant denies that plaintiff has since the occurrence of said casualty been discharged from the service of defendant either as or for the reasons alleged in said complaint or otherwise.

The defendant denies that McClintock, the conductor above mentioned, was always or ever a negligent, unskillful or improper person to be employed as conductor or in other employment incident to the management of a railroad, and it denies that said McClintock while in the employ of defendant was habitually negligent in running and operating trains, or guilty of any specific acts of negligence either as alleged in said complaint or otherwise.

And defendant denies that at any time prior to said casualty it had any knowledge or notice that said McClintock was a negligent, unskillful or improper person to be employed as a conductor or in other employment incident to the management of a railroad, and it denies that it had any knowledge or notice that said McClintock was habitually negligent or that he had committed any acts of negligence either as alleged in said complaint or otherwise.

27 The defendant denies that the "rock cut" mentioned in
said complaint is or at the time mentioned was a dangerous or unsafe portion of defendant's road, and denies that defendant ever knew it to be such or was guilty of any negligence in omitting to keep the same guarded or to provide means of giving warning of danger at said place.

The defendant is informed and believes that by reason of the casualty mentioned in said complaint plaintiff received some injury, but as to whether he was grievously hurt and as to whether he suffered any or all the injuries in said complaint mentioned, and as to the extent and nature of such injuries, and as to each of said alleged injuries, and as to whether plaintiff was otherwise injured in body, mind, or faculties, and as to whether he now is or will be unable to follow his vocation as an engineer or to follow or procure other remunerative employment, defendant has no knowledge or information thereof or of any of said matters sufficient to form a belief.

The defendant denies that the injuries complained of or any of them was the result of any negligence, act or omission on the part of defendant, and denies that in respect to any of the matters alleged in said complaint defendant was guilty of any negligence or violated any of its duties or obligations to plaintiff.

28 The defendant denies that by reason of the matters alleged
in said complaint or any of them plaintiff has been damaged in the sum of twenty thousand dollars, and as to the amount in which plaintiff has been damaged by reason thereof, defendant avers that it has no knowledge or information sufficient to form a belief, and defendant avers that as to whether plaintiff incurred expense in the sum of one hundred and twenty-four dollars or in any sum for sur-

gical attendance and medicines it has no knowledge or information thereof sufficient to form a belief.

As to whether plaintiff's work or services would have during the remainder of his life or any part of it been worth the sum of $3.70 per day or any sum whatever, and as to whether plaintiff could have obtained employment during the remainder of his life or any part of it, and as to what part of it, either for the wages aforesaid or otherwise, if he had not been disabled as alleged in said complaint, and as to plaintiff's expectation of life, and as to each and every matter alleged in said complaint as constituting or relating to the special damages therein claimed, defendant avers that it has no knowledge or information thereof sufficient to form a belief, 29 and defendant denies that plaintiff has suffered special damage as alleged in said complaint or otherwise in the sum of ten thousand dollars, or in any sum whatever.

And the defendant denies that by reason of any negligence, act or omission of defendant, plaintiff has suffered any damage or injury whatever, either to the amount alleged in said complaint or otherwise.

Wherefore defendant asks to be hence dismissed with costs.

LOCHRAN, McNAIR & GILFILLAN,
Defendants' Attorneys,
Minneapolis, Minnesota.

30 STATE OF MINNESOTA, } ss.
County of Hennepin, }

John B. Gilfillan came before me personally, and being duly sworn says that he is a member of the law firm of Lochran, McNair & Gilfillan, and one of the attorneys for the defendant in the above entitled action; that the foregoing answer is true to the best of his knowledge, information and belief, and that the reason why this verification is not made by said defendant is that said defendant and its officers are absent from the county of Hennepin, Minnesota, where resides this affiant.

J. B. GILFILLAN.

Subscribed and sworn to before me this 13th day of May, A. D. 1881.

[NOTARIAL SEAL.] FRANCIS B. BAILEY,
Notary Public,
Hennepin Co., Minn.

(Endorsed:) Circuit Court of the United States, district of Minnesota. Duane O. Ross *vs.* The Chicago, Milwaukee & St. Paul Railway Co. Answer. Lochrane, McNair and Gilfillan, attorneys for defendant, Minneapolis, Minnesota. Filed May 14, 1881. H. E. Mann, clerk.

31 United States Circuit Court for the district of Minnesota.

Term minutes, June term, A. D. 1881, June 22, 1881.

Duane O. Ross
vs.
The Chicago, Milwaukee and St. Paul Railway Company.

Before Hon. George W. McCrary, circuit judge.

This cause coming on for trial, the parties appeared by their respective attorneys, whereupon a jury being called, came, to wit: John M. Cardy, Francis Howard, H. W. Eaton, R. D. Sage, W. A. Perry, Chas. Bonarth, Eugene S. Wooldridge, W. E. Brimhall, M. H. Dike, H. Rothe, and the regular panel being exhausted the following talismen, Henry Myerding & S. M. Connell, who are duly empaneled and sworn.

C. K. Davis, esq., opens the case on the part of the plaintiff.

Duane O. Ross is sworn and examined as a witness for plaintiff.
David M. Goodwin “ “ “ “ “ “ “
C. H. River “ “ “ “ “ “ “
Joseph O. Bathe “ “ “ “ “ “ “
Dr. Atwood “ “ “ “ “ “ “

32 United States Circuit Court for the district of Minnesota.

Term minutes, June term, A. D. 1881, June 23, 1881.

Duane O. Ross
vs.
The Chicago, Milwaukee and St. Paul Railway Company.

Before Hon. Geo. W. McCrary, circuit judge.

This cause coming on for further hearing, the parties appeared by their respective attorneys, and the jury heretofore empaneled and sworn herein, being called, came also.

Charles H. Case is sworn and examined as a witness for plaintiff.
James H. Burchard “ “ “ “ “ “ “

And here the plaintiff rests his case.

The defendant moves that the court instruct the jury to find a verdict for the defendant, which motion, after argument by Wm. Lochran, esq., one of the attorneys for the defendant, is overruled by the court.

W. W. McNair, esq., opens the case for the defendant.

Dr. A. A. Ames is sworn and examined as a witness for defendant.
John Ryan “ “ “ “ “ “ “ “
F. K. Underwood “ “ “ “ “ “ “
F. C. Allen “ “ “ “ “ “ “
Chas. H. Case is recalled “ “ “ “ “ “
—— Howard is sworn “ “ “ “ “ “

And here the defendant rests his case.

J. B. Gilfillan, esq., sums up the case for the defendant.

33 United States Circuit Court for the district of Minnesota.

Term minutes June term, A. D. 1881, June 24, 1881.

Duane O. Ross
vs.
The Chicago, Milwaukee and St. Paul Railway Company.

Before Hon. Geo. W. McCrary, circuit judge.

This cause coming on for further trial, the parties appeared by their respective attorneys, and the jury heretofore empaneled and sworn herein, being called, came also.

J. B. Gilfillan, esq., further sums up for the defendant.

C. K. Davis, esq., sums up for the plaintiff.

Charge is given the jury by the court, and they retire in charge of an officer duly sworn and qualified to attend them, to consider of their verdict, and on being returned unto court present to the court their verdict in writing entitled in said cause, and in the words and figures following, to wit: "We, the jury, find for the plaintiff, and assess his damages at the sum of ten thousand five hundred dollars ($10,500.)

S. M. CONNELL,
Foreman.

"We, the jury, have considered the following questions submitted by the court, to wit:

1st. Was McClintock, the conductor, a person of negligent habits and character? and we answer, Yes.

34 2d. If so, had the defendant notice of the negligent character of said conductor long enough before the accident to have discharged him prior thereto? and we answer, Yes.

S. M. CONNELL,
Foreman.

35 U. S. Circuit Court,
Dist. of Minnesota.

Duane O. Ross
vs.
The Chicago, Milwaukee & St. Paul Railway Company.
Charge of court to jury.

Gentlemen of the Jury: It is your exclusive province to consider and decide all the disputed questions of fact which arise in this case; it is the duty of the court, however, to instruct you concerning the questions of law which arise and which ought to be understood by the jury in order that they may properly apply the facts.

The plaintiff sues the defendant to recover damages for personal injuries which he has received, as he alleges, through the negligence of the defendant. The controlling question in the case, then, is one of negligence. The fundamental inquiry is whether the plaintiff has received his injury because of the negligence of the defendant and without any negligence of his own.

Negligence is the want of ordinary care and pruduce—such care and prudence as a man of common intelligence would exercise under the circumstances.

The defendant here is a corporation, and in the nature of things a corporation must always act by and through its agents and servants. A corporation is an artificial being—in law, it is a person; but it is not tangible, and has no visible existence that we can see and handle. It acts by its officers and agents. The question here is whether this corporation has been guilty of negligence by which the plaintiff has been injured.

The general rule is that a corporation is bound by the acts of its agents and servants, and is liable for their negligence in the performance of the duties which it imposes upon them. That is the general rule, but to that general rule there is an exception, which is as follows: If a corporation employs several agents as fellow servants in the same common employment, and one of these servants is injured by the neglect or wrong of another, the corporation is not liable unless it be that the servant who is guilty of the wrong or the negligence was employed by the company with knowledge that he was incompetent or negligent, or was continued in service by the company after notice of the fact that he was incompetent or negligent.

This brings us, gentlemen, to the first question in dispute in this case. It is alleged by the defendant here, as one of the grounds of defense, that the plaintiff was injured by the negligence of a fellow servant, employed in the same common service with himself, and this makes it necessary for us to inquire what is meant in law by a fellow servant, employed in the same common employment. It is very clear, I think, that if the company sees fit to place one of its employes under the control and direction of another, that then the two are not fellow servants engaged in the same common employment within the meaning of the rule of law of which I am speaking. It is conceded here that this plaintiff was an engineer upon a freight train at the time of the accident; that one McClintock was the conductor upon that train; and it is not seriously disputed that the accident was the result of the negligence of the conductor in failing to show to the engineer the order which he had received to stop the train at a station which, I believe, is called South Minneapolis. And, in order to determine this question, it will be necessary to refer to the general order of the company, which has an important bearing upon it, regulating the delivery of orders concerning the running of trains. It is averred in the petition, and is admitted by the answer, that at the time of this accident there was a general order in force, issued by this company, for the guidance of its employes in cases of this sort, which is as follows: "Conductors must, in all cases, while running by telegraph or special orders, show the same to the engineer of their train before leaving stations where the orders are received. The engineer must read and understand the order before leaving the station." By this general order, gentlemen, as I understand and construe it, the company made the engineer, in an important sense, subordinate to the conductor. By it the conductor was made the medium through whom and by whom the company communicated its orders touching the running of trains to the engineer. The company saw fit to make him their agent and representative for this purpose, and to require plaintiff to receive its orders in this way. I am of opinion that in respect to the duty of delivering or showing the running orders to the engineer the conductor was the superior of the engineer; that he stood in the place and stead of the company, and was, for that purpose, a vice-principal. It follows from this that if the accident complained of was the result of the negligence of the conductor in failing to deliver the running orders to the plaintiff on the night of the accident, the plaintiff must recover unless his own negligence caused or contributed to the injury. And upon that subject—of contributory negligence on the part of the plaintiff—I will speak presently. That is all, I think, that need be said to you upon that branch of the case.

If you find that the accident was caused by the failure of the conductor to deliver the order concerning the running of the train that night to the plaintiff, who was the engineer, and if you also find that plaintiff was injured, and that he did not contribute to his injury by any negligence of his own, then the law is that the defendant is liable. Because, I hold that, under the order to which I have called your attention, the relation of superior and inferior was created by the company as between these two servants in the particular matter of the operation of its trains, and they were not, within the meaning of the law, fellow servants engaged in the same common employment.

But the plaintiff claims to recover upon another ground, and it will be your duty to pass upon that also. He claims that he is entitled to recover upon the ground that McClintock, the conductor, was a negligent and unfit person to be entrusted with the duties of a conductor; and that the defendant's company had sufficient notice of that fact before the accident and continued him in its service. This is denied by the defendant, and the issue thus joined, being one purely of fact, is for you to determine from all of the evidence before you.

36 When the plaintiff entered the service of the defendant he voluntarily assumed all the usual and ordinary risks belonging to the occupation in which he was about to be engaged; but the company also became obligated to use proper diligence in furnishing him with reasonably suitable and proper machinery with which to work; and also in the employment of fellow servants who should have ordinary fitness and competency for the performance of their duties. In other words, it was the duty of the company not to subject plaintiff to any extraordinary or unusual danger by employing,

knowingly, other servants to operate the trains with him who were negligent or incompetent. And it was also the duty of the company, if they ignorantly or without notice employed an incompetent or improper servant and afterwards became advised or had notice of the fact of his character for incompetency or negligence, it was the duty of the company under those circumstances to discharge him. And if they continued such person in their service as conductor after notice, they became liable for any damage that the plaintiff may have sustained through the negligence of such conductor.

It was the duty of the plaintiff, however, when he became aware of the negligence of this conductor, to give notice to the company. If he knew it himself, and took no steps to communicate the fact to the company, gave them no warning about it, and they went on in ignorance of it and continued him in their service, he cannot complain. Whether he gave notice to the company of the negligence of this conductor is a question of fact for you to decide upon the evidence. If it be true that he communicated the fact by letter to the master mechanic, and the master merhanic laid it before the assistant superintendent, who acted upon it so far as to institute an investigation concerning it, that was sufficient notice to the company.

I instruct you further that the company cannot protect itself from the consequences of the negligence of the conductor after notice of his negligent character by showing that they believed him to be competent and diligent, nor by showing that they instituted an investigation which resulted in his acquittal upon the charges of competency and negligence which were made against him. When the company was notified by another employe that this conductor was a negligent and incompetent official, it continued him at its own risk, notwithstanding the fact that he was believed by the company to be competent; they were bound, in other words, by the fact, whatever the fact might be. They were put upon inquiry and as to the rights of other employes. They cannot shield themselves upon the ground that they did not believe in the truth of the charges that were made against him. So that upon this branch of the case, gentlemen, you are simply to inquire, first, whether McClintock was in fact a negligent and unfit person to be entrusted with the duties of the conductor of the train; and second, whether the company, under the rules that I have already indicated to you, had notice of the fact of his unfitness or his negligence before the time of this accident and continued him in their service notwithstanding such notice. Upon this branch of the case I shall ask you to find specially by answering an interrogatory which I have prepared and will submit to you; I will ask you to say specially upon this branch of the case whether McClintock was a negligent person, unfit person, and whether the company had notice. It may be necessary, in view of possible further proceedings in this case, that we should have your finding upon that specific fact.

But it is insisted by the defendant that even though the company may be guilty of negligence, either by the act of the conductor in failing to deliver these running orders on the night in question, or that the conductor was known to be negligent, and their having continued him in service, that although you find for the plaintiff upon the question of the defendant's negligence, that yet the plaintiff cannot recover because he was also negligent, and his negligence contributed to the accident. Upon this subject, gentlemen, you have all the facts before you, and it is not expedient, even if it were proper, for me to comment upon the testimony. You will look into the testimony as it has been delivered to you, showing the conduct of the plaintiff on the night of the accident—the manner in which he run the train. You will consider the question whether there is any proof tending to show, or sufficient to show, that he knew, or had any reason to believe, that the gravel train was on the track over which he was called upon to pass; whether there is anything to show that he was bound to stop at the station and wait for the gravel train without orders, because it is conceded that the orders were not delivered to him by the conductor.

There is another branch of the case upon which it is earnestly contended by the defendant that the plaintiff has been shown to have
been guilty of contributory negligence. It is said that he had
37 notice of the negligence of this conductor, McClintock; that
for some time before this accident he confessedly knew that McClintock was a negligent and improper person to hold that position, and that, knowing that fact, he was negligent in continuing in the service of the company.

The law upon this subject, gentlemen, is that if one employe of a railroad company discovers that a co-employe of his is negligent or unskillful, it is his duty to give notice to the company, but it is not necessary that he should at once quit the service of the company. After having given notice, he may continue in the service of the company for a reasonable time, in the expectation that the company will take proper action in the premises and discharge the unworthy and incompetent person. And if, within this reasonable time, after notice has been given, and before the objectionable person has been discharged, the party is injured by the negligence of the person complained of, the company is liable. And I say to you that two or three or four weeks would not, in my judgment, be considered an unreasonable time in which, under all the circumstances, a party might delay for the action of the company, upon such complaint having been made.

I think of nothing further, gentlemen, except to call your attention to the question of damages, in the event that you find a verdict for the plaintiff. You will take into consideration upon that subject, if your verdict is for the plaintiff, all the facts and circumstances which have been shown to you in evidence. You will consider carefully the medical testimony and the testimony of the plaintiff and all the testimony that there is before you touching the nature and the extent of the plaintiff's injuries and the question as to their probable duration—as to whether they are temporary or permanent—

their effect upon his ability to earn a living, to pursue his ordinary avocation since the accident and up to this time, and their probable effect upon his health and strength and his ability to pursue his avocation or to earn a living in the future. You will consider the pain and suffering which have been the result of the accident and injury and what is probable in the future. You will take into account his expenses for physicians and medicines, if that has been established before you to your sstisfaction; and upon all the facts in the case you will determine, as best you can, what would be a reasonable and fair compensation for the injuries of the plaintiff, and you will allow him that, and will not allow him what would be considered an unreasonable or excessive amount. It is for you to say under the circumstances, what would be fair and just. Of course it is very difficult to estimate things of this kind. The events of the future cannot be foretold with certainty. All you can do, gentlemen, is to take all the facts that appear before you in this case and reach the best result that you can upon that branch of it, in the event, of course, that you find upon the other question that I have called to your attention in favor of the plaintiff.

If you find for the plaintiff, the form of your verdict will be as follows: "Title of the cause. We, the jury, find for the plaintiff, and asses his damages at —— dollars," to be signed by one of your number as foreman. If you find for the defendant, the form of your verdict will be as follows: "We, the jury, find for the defendant," and signed by the foreman. The jury will find specially upon the question of the negligent character of Conductor McClintock, and the notice thereof to the defendant; and upon this subject the form of your verdict will be as follows: "We, the jury, have considered the following questions submitted by the court, to wit: First, was McClintock, the conductor, a person of negligent habits and character? And we answer it ——," inserting either "yes" or "no," as as you may decide. "Second, if so, had the defendant notice of the negligent character of said conductor long enough before the accident to have discharged him prior thereto? And we answer ——;" here insert "yes" or "no," and signed by the foreman.

38 Circuit Court of the United States of America for the district of Minnesota.

Duane O. Ross, plaintiff,
vs.
The Chicago, Milwaukee and St. Paul Railway Company, defendant.

No. .—June term, 1881.

Verdict, $10,500, June 24th, 1881, and interest.

Clerk's fees:		
Writ	$1 20	
Filing papers, 15; 9 oaths	2 40	
Commissions, 3 subpœnas	75	
Entries and record, 37 folios	5 55	
Certified copies, ; folios		
Complete record		
Dockets, indexes, and services		
Receiving, keeping, and paying, $, Rgt D. K. T.	3 00	
Affidavits, certificate, and seal	50	
Calling and swearing jury, 75 cents; officer, 20 cents	95	
Report on assessment of damages, 75 cents...		
Execution	1 20	
		$15 45
Marshal's fees:		
On writ, $4.90; subpœnas, $5.85; writ of enquiry		10 75
Witness fees:		
Name, Oscar Lyke, 1 days, 20 miles	$2 50	
" D. M. Goodwin, 2 days, 20 miles	4 00	
" Charles Case, 2 days, 20 miles	4 00	
" Ch. H. Prior, 2 days, 20 miles	4 00	
" J. O. Ratlin, 2 days, 20 miles	4 00	
" Dr. Atwood, 2 days, — miles	3 00	
" John Ryan, 2 days, 20 miles	4 00	
" Dr. Ames, 2 days, 20 miles	4 00	
" James Collinton, 2 days, 20 miles	5 00	
" H. R. Williams, 2 days, 20 miles	4 00	
" James Burgett, 2 days, 16 miles	3 80	
		43 30
Attorney's fees:		
Docket fee, $1.20; deposition, $2.56		22 50
2 affidavits	50	50
Master's and examiner's fees:		
Computing and reporting amount due, $; taking depositions, $6.00		6 00
Printer's fees		
Costs taxed at $98.50		$98 50

H. E. MANN, *Clerk.*

St. Paul, July 14, 1881.

The above costs may be taxed without notice.

C. K. DAVIS, *Pl'ff Att'y.*
LOCHRAN, McNAIR & GILFILLAN,
Att'y for Def't.

39 STATE OF MINNESOTA, } *ss.*
County of Ramsey, }

C. K. DAVIS, having been duly sworn, deposes that the within bill of costs is just and correct; that the disbursements charged have been necessarily paid or incurred by the plaintiff; that each witness charged for traveled the distance and attended the time charged and was necessary and material for the plaintiff when subpœnaed, and are sworn for the plaintiff except the witness Ames, who was subpœnaed and paid by plaintiff and sworn by defendant, and the witness Williams & Collington.

C. K. DAVIS.

Subscribed and sworn to this 2 day of July, 1881, before me.

[NOTARIAL SEAL.] SAMUEL MORRISON,
Notary Public, Ramsey Co., Minn.

To Messrs. LOCHRAN, MCNAIR & GILFILLAN:

Take notice, that this bill of costs will be presented to the clerk for taxation at his office on the day of July, 1881, at 10 o'clock a. m.

C. K. DAVIS,
Pl'ff Att'y.

(Endorsed:) U. S. Circuit Court, district of Minnesota. Duane O. Ross *vs.* The Chicago, Milwaukee & St. Paul Railway Company. Bill of costs. Filed , 187 . , clerk. $. C. K. Davis, pl'ff's att'y, Saint Paul, Minn.

40 United States Circuit Court, district of Minnesota.

Duane O. Ross
vs.
The Chicago, Milwaukee & St. Paul Railway Co. }

Be it remembered, that at a general term of this court, begun and holden at St. Paul, within and for the district of Minnesota, on the 20th day of June, A. D. 1881, the above entitled cause came regularly on for trial upon the issues of fact arising upon the complaint of the plaintiff and answer thereto of the defendant before the Honorable George W. McCrary, circuit judge, and a jury duly empanneled and sworn.

And thereupon the plaintiff, to maintain the issues upon his part, introduced evidence tending to prove that he, said plaintiff, was a locomotive engineer of fifteen years' experience, and had no other calling; that he was forty-one years of age, and had been in the employ of the defendant in that capacity for one year next preceding the accident in which he received the injuries complained of, and was then receiving wages at the rate of three dollars and seventy cents per day.

41 That for six weeks before the said accident he was employed as such engineer in running a regular freight train between Minneapolis and Hastings, in the state of Minnesota, and that the regular time for his train to leave Minneapolis was fifteen minutes past one o'clock in the morning, passing by way of Fort Snelling across the Minnesota river to Mendota; thence passing St. Paul junction and across the Mississippi river to St. Paul; thence on the east side of the Mississippi river past Langdon station, and recrossing the Mississippi into Hastings. That this train was known as No. 28 when leaving Minneapolis until it reached St. Paul, and as No. 8 between St. Paul and Hastings. That in the year 1880 Charles H. Prior was superintendent of defendant's railroads in the state of Minnesota, and Charles W. Case assistant superintendent of the same railroads, except that after the first day of October of that year Frederick D. Underwood was assistant superintendent of what was known as the river division, including the railroad between St. Paul and Hastings. That Henry R. Williams and J. S. Ryan were train despatchers, and J. O. Ruter master mechanic of defendant's railroads in said state, having the right to hire and discharge 42 its engineers and firemen, and that said officers were all located at Minneapolis at the general office of defendant in said state. That trains upon said railroad were run under the directions and orders of a train despatcher, and that plaintiff's train had the right of way on its schedule time, except when orders from the train despatcher were received directing its stoppage at any points for the meeting or passage of other trains, or for other purposes.

That prior to said accident the rules of the defendant company required that all such orders from the train despatcher should be delivered to the conductor before the starting of the train, who should sign a receipt for the order setting forth its substance and signifying that he understood the order, and that the conductor should before starting the train show such order to the engineer for his guidance; that during the whole time when plaintiff was running said freight train as engineer one Hugh E. McClintock was in the employ of defendant as conductor of the same train, and that three brakemen were also employed thereon.

That for a week just prior to said accident a gravel train had 43 been run by defendant, hauling gravel from a pit near Mendota to Minneapolis, in the night, for the construction of a new and separate line of def't's railroad, then being built between St. Paul and Minneapolis, and that plaintiff's freight train had during that time, by orders of the train despatcher, delivered as aforesaid, been stopped upon sidings or side tracks at South Minneapolis, and elsewhere between Minneapolis and St. Paul junction, for the passage of said gravel train. That on the morning of the sixth day of November, A. D. 1880, and before the time of the leaving of plaintiff's train from Minneapolis, an order from the train despatcher, directing that plaintiff's train be stopped and held upon the siding at South Minneapolis until the gravel train from Mendota should pass that

place, was duly delivered to McClintock, the conductor of plaintiff's train, and duly receipted for by him, and that such order was not communicated to plaintiff by said conductor, nor by any one; that McClintock, the conductor, passed into the caboos, and that at or
soon after the time for starting, upon a signal for starting
44 given by one of the brakemen as directed by the conductor,
and which plaintiff supposed was given by the conductor, or by his direction, plaintiff started the train, which was a light one of six or eight cars; that the conductor fell asleep in the caboos soon after or about the time of starting; that no halt was made at South Minneapolis, which was about one and a half miles from the place of starting, except for such changing of switches as were necessary to pass upon the main track beyond, and that plaintiff's train passed Minnehaha station, reaching a down grade, at a speed of fifteen miles or upwards per hour, with no brakes set, and entered a deep, narrow cut three or four hundred feet in length, through which the railroad passed at a considerable curve, when plaintiff discovered the reflection on the bank of the light from the engine of the gravel train, which was approaching from the opposite direction, with six cars loaded with gravel, at a speed of five or six miles an hour, and was within about one hundred feet of plaintiff's engine when its light was first seen by plaintiff.

That plaintiff whistled for brakes and reversed his engine, which
however almost immediately struck the engine of the gravel
45 train; the shock nearly destroying the two engines and dam-
aging cars of both trains, causing the death of one person and severe injuries to others.

That plaintiff received a severe contused cut across the right cheek four or five inches in length, extending the rim of the right ear; that his left wrist was badly fractured, and that he received a deep triangular cut on the left side of the back six inches or more in length and an inch and a half in depth, near and just above the left hip, and was otherwise bruised and injured. That his wrist is still stiff and disabled, so as to afford him little use of his left hand, and that he continues to suffer pain and walks with difficulty.

Plaintiff introduced medical and other testimony tending to show that his right eye and his right ear were so affected by the injury as to impair the efficiency of those organs, and that his injuries were of a permanent character, and such as to be likely to disable him from
ever resuming his vocation as a locomotive engineer.

46 The plaintiff further introduced testimony tending to show
that in April, A. D. 1880, upon defendant's railroad near the city of St. Paul, in a freight train upon which said McClintock was then conductor, a car containing live-stock and furniture took fire and was burned to such an extent as to destroy a portion of the freight, and that thereupon when the train reached the water tank at St. Paul, where the fire was extinguished, the said McClintock was summarily suspended from his functions as conductor, by Mr. Case, the assistant superintendent, who was present. There was no

evidence as to the cause of the fire save the surmise of a witness that it might have been caused by sparks from the engine.

The plaintiff introduced further testimony tending to show that on the 12th of October, A. D. 1880, it was necessary that the train upon which the plaintiff was engineer and said McClintock conductor should stop at the siding at Langdon to permit the passage of another regular train coming from the opposite direction and usually met at that place; that plaintiff's train had about thirty cars, mostly loaded, with its regular caboos in the rear and a new caboos next the engine, and that there were three brakemen on the
47 train. That the siding at Langdon extended from about twenty rods before reaching the station to about the same distance beyond the station, and that by reason of a disabled car being on the siding near its upper end, first approached by plaintiff's train, the plaintiff proposed to pass by to the lower or end of the further siding and then back his train upon it. That the grade was descending from a mile before reaching Langdon to a point the same distance beyond that station, and that when plaintiff's train reached within a mile of Langdon he gave the signal—a prolonged whistle—denoting the approach to a station; that on reaching the siding and finding no brakes had been applied to the train he whistled the signal for brakes five times, and after passing the siding and still finding no brakes applied he sent back his fireman, who set fifteen to eighteen brakes and stopped the train nearly a mile beyond the station, and that about the time the train stopped, McClintock, the conductor, came out of the forward caboos and the three brakemen appeared, all having the appearance of having been sleeping. The plaintiff's testimony tended to show further that the proper place for the
48 conductor was in the rear caboos, and that it was the duty of the brakemen to respond to the signal for setting brakes without awaiting or expecting orders from the conductor. Plaintiff's testimony further tended to prove that on the same day he wrote and mailed from Hastings, to J. O. Patter, the master mechanic at Minneapolis, a lettter as follows:

"CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY,
HASTINGS STATION, *Oct.* 12*th*, 1880.

J. O. PATTER:

DEAR SIR: The conductor and brakemen of train No. 8, between Hastings and Minneapolis, were fast asleep when we arrived at the mile board at Langdon. I shut off steam and whistled four times for brakes and had to send my fireman to brake the train. He set up eighteen brakes before we stopped, and that was one mile through the station.

Respectfully, DUANE O. ROSS."

And that soon afterwards and before October 16th, 1880, said Patter passed said letter over to Mr. Williams, the train despatcher, and called his attention to the matter, and that said Williams made inquiries about the same matter of plaintiff, who told him the same

facts and expressed his opinion to Williams that McClintock was
not a safe man to run with and his wish and purpose not to
49 run with him, and that said letter was passed over by Wil-
liams to Mr. Underwood, the assistant superintendent. Upon this matter the plaintiff, being a witness in his own behalf, stated that at the time of his conversation with Williams he also had a conversation with Mr. Patter, and was asked by his counsel the following question:

Question. "And what did you tell Mr. Patter on that occasion?"

This was objected to by the counsel for the defendant as incompetent; it not appearing that Patter had authority to act for the defendant in the matter.

The court overruled the objection and the defendant duly excepted to the ruling, and the exception was allowed and noted.

The witness answered that he spoke to Patter about McClintock; that he, plaintiff, did not get along well with him and wished Patter to give him another run; that Patter laughed and said, "I would not let a boy beat me out of a job," and said he would make different arrangements some way; shift plaintiff around some other way.

The plaintiff further introduced testimony tending to show
50 that on a certain night, about four days before the accident,
one Oscar Lyke, then a locomotive engineer, was by the train despatcher ordered to follow with his engine train No. 28 from Minneapolis to St. Paul, and notified that plaintiff's engine on said train would carry red lights as a signal that an engine was following, and that orders to the same effect were, before plaintiff's train started, given to and receipted by said McClintock; that just before plaintiff's train started said Lyke showed said orders to plaintiff and enquired if he had been notified thereof by McClintock; that in fact said McClintock never showed such orders to the plaintiff, but upon being apprized of them by Lyke, plaintiff caused his fireman to get the lights in readiness, and before reaching Fort Snelling hung out such lights without orders from the conductor, and that on passing Mendota the gravel train stood at the switch ready to move out when plaintiff's train passed.

The only evidence tending to show that any notice of the last above alleged neglect of the said McClintock had been given to the defendant or any of its officers was contained in the deposition of said Oscar Lyke, who testified that he had related the matter to J. S. Ryan,
train despatcher, at the company's office, at Minneapolis, and
51 that Mr. Williams and Mr. Case were present, and respecting
the time he said, "This talk was the same day when Ross was hurt at night; it was in the morning or forenoon before he was hurt;" further respecting such conversation with Mr. Ryan, he said "then Mr. Case stepped in and inquired into business; I told him the circumstances that transpired; he said it's a damned poor time to make any report about this now."

The plaintiff, further to maintain the issues on his part, introduced as a witness James S. Burgett, who was rear brakeman upon the freight train run by plaintiff, and his testimony tended to show that on the night of the accident said McClintock was asleep from soon after leaving Minneapolis until the collision took place. The counsel for plaintiff asked the following question:

Question. "What were McClintock's habits as to being awake or going to sleep or being asleep when you arrived at stations?"

This question was objected to by defendant's counsel as incompetent, unless notice to the company or its officers were shown. The objection was overruled by the court, and the defendant duly excepted, and the exception was allowed and noted.

52 The witness answered: "Well, his habit as a general thing was to be asleep."

(The witness stated that he had never made complaint to the superintendent or officers of the defendant of this conductor going to sleep.)

Charles H. Prior, superintendent, being sworn as a witness for plaintiff, was asked by plaintiff's counsel the following questions:

Question: "Do you know whether it was the custom of railroads to require orders for the movement of trains to be addressed both to the conductor and engineer?"

(Defendant's counsel objected to this question as incompetent and because the plaintiff himself knew the custom of this road.)

(The objection was overruled by the court and the defendant duly excepted to the ruling, and the exception was allowed and noted.)

The witness answered: "Different roads have different rules; I know roads where they have rules where they address directions directly to the engineer and also to the conductor."

Question: "Which do you consider the safest and most prudent?"

(This question was also objected to by defendant's counsel as incompetent and immaterial.)

53 (The court overruled the objection and the defendant duly excepted to the ruling, and the exception was allowed and noted.)

The witness answered: "I think that rule a little better than the other, although we worked the other for a number of years."

The same witness further testified that the old system of giving the train despatcher's orders to the conductor and requiring him to communicate them to the engineer had been in use on defendant's railroad from its commencement up to the time of this accident, from fifteen to twenty years, and was still in use on defendant's road east of the Mississippi river and was the system most commonly used.

Whereupon the plaintiff's counsel asked the same witness the following question:

Ques. "But the new system prevails in your jurisdiction, don't it?"

(The defendant's counsel objected to this question as incompetent. The court overruled the objection and defendant excepted to the ruling, and the exception was allowed and noted.)

The witness answered that it did since Nov. 9th, A. D. 1880, re-

quiring such orders to be given to and receipted by engineers
54 as well as conductors.

The testimony introduced by plaintiff further tended to show that all employes on moving trains, including engineers and firemen, were under the control of the train despatcher, and that the master mechanic had nothing to do with them.

No other evidence of any negligence on the part of said conductor, McClintock, nor of any notice to the defendant or any of its officers of any negligence of said McClintock, nor of any negligence on the part of the defendant or any of its officers, was introduced upon said trial, and the plaintiff here rested.

And thereupon the defendant, by its counsel, moved the court to instruct the jury to return a verdict for the defendant upon the following grounds:

First. That the negligence, so far as any is proven, was that of a fellow-servant of plaintiff, for which the employer is not responsiible; and

Second. That the evidence shows such contributory negligence on the part of the plaintiff as must defeat his right to recover.

The court overruled and denied this motion, and to this ruling the defendant duly excepted, and the exception was allowed and noted.

55 Thereupon the defendant, to prove the issues on its part, introduced medical evidence tending to prove that the plaintiff's recovery from his injuries was progressing at such a rate that he would probably be able to ressume his avocation as locomotive engineer within six months from the time of said trial.

The defendant further introduced the testimony of John S. Ryan, its train despatcher, and Charles W. Case, its assistant superintendent, tending to show that their conversation with said Oscar Lyke, mentioned in his deposition, occurred on the morning of the day following the accident wherein plaintiff was injured, and that neither said Ryan nor said Case had any notice or knowledge of any of the alleged negligence or misconduct of said McClintock, testified to by said Lyke, until after said accident.

The defendant, further to prove the issues on its part, called as a witness Frederick D. Underwood, whose testimony tended to show that he was the assistant superintendant of the river division
56 of defendant's railroad in said state, including the railroad between St. Paul and Hastings, since October 1st, 1880; that he has been employed upon railroads since 1868, in the various capacities of brakeman, baggageman, yard-master, freight conductor, switchman, passanger conductor, and assistant superintendant; that in October, 1880, as such assistant superintendant, he had invested the charges made against said McClintock by the plaintiff, contained in plaintiff's said letter to Potter, in connection with the running of plaintiff's train past Langdon station, and heard the statements both of plaintiff and said McClintock respecting that matter, and upon such investigation came to the conclusion that said

McClintock had not committed any negligence or breach of rules sufficient to cause him to be discharged. The defendant's counsel asked said witness the following questions:

Ques. "Did that investigation develop the fact as to who was to blame for running by Langdon?"

57 This was objected to by plaintiff's counsel as incompetent and as calling for a conclusion. The objection was sustained by the court, and to this ruling the defendant duly excepted, and the exception was allowed and noted.

Ques. "After making this investigation was the action of the company in accordance with such recommendation as you may have made?"

This was objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial. The court sustained the objection, and to this ruling the defendant duly excepted, and the exception was allowed and noted.

The defendnt introduced further testimony of this witness and Charles W. Case, who had twelve years' experience as a locomotive engineer, tending to show that in passing by Langdon, when plaintiff found that his calls for brakes were not responded to, he should have reversed his engine so as to exert its propelling force against the train, and that he could thereby have stopped the train before running as far as it was run.

58 The defendant further introduced the testimony of said Charles W. Case, its assistant superintendent, tending to show that he was present at the water tank in St. Paul at the time when the burning car upon the train upon which said McClintock was conductor, before mentioned, reached that place, where the fire was extinguished. And that he thereupon suspended said McClintock from his functions as conductor until he could investigate the matter. That he, the said Case, did investigate that matter himself, and thereby satisfied himself that said McClintock had done what was proper, and thereupon reinstated said McClintock as conductor.

The defendant introduced the testimony of several officers and employees of said railroad company, tending to show that they were acquainted with the said McClintock and his reputation prior to said accident, and that up to that time his general reputation as a conductor was good.

59 The defendant introduced as a witness F. C. Allen, whose testimony tended to show that he was the conductor of the gravel train which collided with plaintiff's train, causing the accident; that his train was then under orders to run to South Minneapolis regardless of plaintiff's train; that having twelve cars loaded with gravel his train stalled before reaching the cut where the collision happened, and that he separated his train in the middle and took six cars to and upon the siding at Minnnehaha station, and went back with the engine for the other six cars, and was coming with them through the cut when the collision occurred; that said gravel train had run in the night about a week, and that when he

could reach Minneapolis before the starting time for plaintiff's train he ran without orders, otherwise upon orders, and had met or passed plaintiff's train at same place about every night during the week.

The defendant also introduced in evidence the following of its published rules to be observed by its conductors, engineers, station agents, & employees:

Rule 24. "When trains are to meet each other, the train having the right of the road shall occupy the main track, excepting when there are special orders to the contrary. Trains taking side tracks will always enter at the nearest end, except when this is im-
60 practicable, in which case the train must be sufficiently protected by flag, before running by station to back into siding."

Rule 78. "Any employee who may be cognizant of default in duty by another employee and fails to report the same to the superintendent, becomes equally censurable with the defaulter"

The court here charged the jury as follows:

[Here follows the charge of the court as before given.]

61 To the following portions of said charge of the court to the jury, the defendant by its counsel duly excepted, and the extions were allowed and noted, viz:

"It is very clear, I think, that if the company sees fit to place one of its employees under the control and direction of another, that then the two are not fellow servants engaged in the same common employment, within the meaning of the rule of law of which I am speaking."

Also to the following portion of said charge, the defendant by its counsel duly excepted, and the exception was allowed and noted, viz:

"By this general order, gentlemen, as I understand and construe it, the company made the engineer, in an important sense, subordinate to the conductor."

Also to the following portion of said charge, the defendant by its counsel duly excepted, and the exception was allowed and noted, viz:

"I am of the opinion that in respect to the duty of delivering or showing the running orders to the engineer the conductor was the superior of the engineer; that he stood in the place and stead
62 of the company, and was for that purpose a vice-principal.
It follows from this that if the accident complained of was the result of the negligence of the conductor in failing to deliver the running orders to the plaintiff on the night of the accident, the plaintiff must recover, unless his own negligence caused or contributed to the injury."

Also to the following portion of said charge, the defendant by its counsel duly excepted, and the exception was allowed and noted, viz:

"If you find that the accident was caused by the failure of the conductor to deliver the order concerning the running of the train that night, to the plaintiff, who was the engineer, and if you also find that plaintiff was injured and that he did not contribute to his injury by any neglect of his own, then the law is that the defendant is liable. Because I hold, that under the order to which I have called your attention, the relation of superior and inferior was created by the company as between these two servants in the particular matter of the operation of its trains, and they were not, within the meaning of the law, fellow servants engaged in the same common employment."

63 Also to the following portion of said charge, the defendant by its counsel duly excepted, and the exception was allowed and noted, viz:

"And it was also the duty of the company if they ignorantly or without notice employed an incompetent or improper servant, and afterwards, because advised or had notice of the fact of his character for incompetency or negligence, it was the duty of the company under those circumstances to discharge him, and if they continued such persons in their service as conductor after notice, they became liable for any damage that the plaintiff may have sustained through the negligence of the conductor."

Also to the following portion of said charge, the defendant by its counsel duly excepted, and the exception was allowed and noted, viz:

"If it be true that he communicated the fact by letter to the master mechanic and the master mechanic laid it before the assistant superintendent, who acted upon it so far as to institute an investigation concerning it, that was sufficient notice to the company."

64 Also to the following portion of said charge, the defendant by its counsel duly excepted, and the exception was allowed and noted, viz:

"I instruct you further that the company cannot protect itself from the consequences of the negligence of the conductor after notice of the negligent character, by showing that they believed him to be competent and diligent, nor by showing that they instituted an investigation which resulted in his acquittal upon the charges of incompetency and negligence which were made against him."

Also to the following portion of said charge, the defendant by its counsel duly excepted, and the exception was allowed and noted, viz:

"When the company was notified by another employee that this conductor was a negligent and incompetent official, it continued him at its own risk, notwithstanding the fact that he was believed by the company to be competent; they were bound, in other words, by the fact, whatever the fact might be. They were put upon inquiry, and as to the rights of other employees, they cannot shield themselves upon the ground that they did not believe in the truth of the charges that were made against him."

65 Also to the following portion of said charge the defendant duly excepted, and its exception was allowed and noted, viz:

"So that upon this branch of the case, gentlemen, you are simply to inquire—first, whether McClintock was in fact a negligent and unfit person to be entrusted with the duties of the conductor of a train; and second, whether the company under the rules that I have already indicated to you had notice of the fact of his unfitness or his negligence before the time of this accident and continued him in their service notwithstanding such notice."

Also to the following portion of said charge the defendant duly excepted, and its exception was allowed and noted, viz:

"The law upon this subject is, gentlemen, that if one employee of a railroad company discovers that a co-employee of his is negligent and unskilful it is his duty to give notice to the company. But it is not necessary that he should at once quit the service of the company. After having given notice he may continue in the service of the company for a reasonable time in the expectation that the company will take the proper action in the premises and discharge the unworthy and
66 incompetent person, and if within this reasonable time after notice has been given and before the objectionable person has been discharged the party is injured by the negligence of the person complained of, the company is liable."

Also to the following portion of said charge the defendant duly excepted, and the exception was allowed and noted, viz:

"And I say to you that two, or three, or five weeks would not, in my judgment, be considered an unreasonable time in which under all the circumstances a party might delay for the action of the company upon such complaint having been made."

The jury thereupon retired to consider their verdict and rendered a verdict in favor of the plaintiff and against the defendant for the sum of ten thousand five hundred dollars, and answered each of the two questions specially submitted to them by the court in the affirmative.

And because none of the aforesaid matters except said verdict and special findings appear of record, the foregoing bill of exceptions having been examined and found by the court to be conformable
67 to the facts is hereby allowed, signed and sealed by me the judge before whom the said suit was had.

Done at the said June term of the said Circuit Court.

GEO. W. McCRARY, [SEAL.]
Circuit Judge.

(Endorsed:) United States Circuit Court, district of Minnesota. Duane O. Ross *vs.* The Chicago, Milwaukee & St. Paul Railway Company. Bill of exceptions. Original. Filed July 1, 1881. H. E. Mann, clerk.

68 United States Court, district of Minnesota.

Duane O. Ross
vs.
The Chicago, Milwaukee and St. Paul Railway Co. }

This cause having been tried before the court and a jury at the

June term thereof, A. D. 1881, and the said jury having on the 24th day of June A. D. 1881, found a verdict for the plaintiff and assessed his damages at the sum of ten thousand five hundred dollars, and the clerk having computed and ascertained the interest on said verdict from said date to be the sum of forty dollars and eighty-three cents:

Now on motion of plaintiff's attorney it is considered, ordered, and adjudged that the plaintiff do have and recover of and from the defendant the sum of ten thousand five hundred and forty dollars and eighty-three cents (being the amount of said verdict and said interest), besides his costs by him in and about his suit in this behalf expended, taxed at $98.50, and that execution issue therefor.

Judgment record signed this 14th day of July, A. D. 1881.

69 H. E. MANN, *Clerk.*

Damages	$10,540 83
Costs	98 50
Total	$10,639 33

(Indorsed:) Judgment roll. Filed July 14, 1881. H. E. Mann, clerk.

70 United States Circuit Court, district of Minnesota.

Duane O. Ross
vs.
The Chicago, Milwaukee and St. Paul Railway Co.

Assignment of Errors.

The defendant assigns the following errors occurring upon the trial resulting in the judgment in the above entitled action:

1. The court erred in overruling the defendant's objections to the following question to the witness Duane O. Ross: "And what did you tell Mr. Pattee on that occasion?"

2. The court erred in overruling the defendant's objections to the following question to the witness James S. Burgett: "What were McClintock's habits as to being awake or going to sleep, or being asleep when you arrived at stations?"

3. The court erred in overruling the defendant's objections to the following question to the witness Charles H. Prior: "Do you know whether it was the custom of railroads to require orders for the movement of trains to be addressed both to the conductor and the engineer?"

4. The court erred in overruling the defendant's objections to the following question to the same witness, Charles H. Prior: "Which do you consider the safest and most prudent?"

5. The court erred in overruling the defendant's objections
71 to the following questions to the same witness, Charles H.
Prior: "But the new system prevails in your jurisdiction, don't it?"

6. The court erred in refusing defendant's motion, made when plaintiff rested, that it instruct the jury to return a verdict for the defendant.

7. The court erred in sustaining plaintiff's objection to the following question asked the witness Frederick D. Underwood: "Did that investigation develop the fact as to who was to blame for running by Langden?"

8. The court erred in sustaining plaintiff's objections to the following question asked the same witness, Frederick D Underwood: "After making the investigation, was the action of the company in accordance with such recommendation as you may have made?"

9. The court erred in charging the jury as follows: "It is very clear, I think, that if the company sees fit to place one of its employees under the control and direction of another, that then the two are not fellow servants engaged in the same common employment within the meaning of the rule of law of which I am speaking."

10. The court erred in charging the jury as follows: "By this general order, gentlemen, as I understand and construe it, the company made the engineer in an important sense subordinate to the conductor."

72 11. The court erred in charging the jury as follows: "I am of the opinion that in respect to the duty of delivering or showing the running orders to the engineer the conductor was the superior of the engineer; that he stood in place and stead of the the company, and was for that purpose a vice-principal. It follows from this that if the accident complained of was the result of the negligence of the conductor in failing to deliver the running orders to the plaintiff on the night of the accident, the plaintiff must recover, unless his own negligence caused or contributed to the injury."

12. The court erred in charging the jury as follows: "If you find that the accident was caused by the failure of the conductor to deliver the order concerning the running of the train that night to the plaintiff, who was the engineer; and if you also find that plaintiff was injured, and that he did not contribute to his injury by any negligence of his own, then the law is that the defendant is liable, because I hold that under the order to which I have called your attention the relation of superior and inferior was created by the company, as between these two servants in the particular matter of the operation of its trains, and they were not, within the meaning of the law, fellow servants engaged in the same employment."

13. The court erred in charging the jury as follows: "And it was also the duty of the company, if they ignorantly or without
73 notice employed an incompetent or improper servant, and afterwards became advised or had notice of the fact of his character for incompetency or negligence, it was the duty of the company under those circumstances to discharge him; and if they continued such person in their service as conductor after notice they

became liable for any damage that the plaintiff may have sustained through the negligence of such conductor."

14. The court erred in charging the jury as follows: "If it be true that he communicated the fact by letter to the master mechanic and the master mechanic laid it before the assistant superintendent, who acted upon it so far as to institute an investigation concerning it, that was sufficient notice to the company."

15. The court erred in charging the jury as follows: "I instruct you further that the company cannot protect itself from the consequence of the negligence of the conductor after notice of his negligent character by showing that they believed him to be competent and diligent, nor by showing that they instituted an investigation which resulted in his acquittal upon the charges of incompetency and negligence which were made against him."

16. The court erred in charging the jury as follows: "When the company was notified by another employee that this conductor was a negligent and incompetent official, it continued him at its own risk, notwithstanding the fact that he was believed by the
74 company to be competent. They were bound, in other words, by the fact, whatever the fact might be. They were put upon inquiry, and as to the rights of other employees they cannot shield themselves upon the ground that they did not believe in the truth of the charges that were made against him."

17. The court erred in charging the jury as follows: "So that upon this branch of the case, gentlemen, you are simply to inquire, first, whether McClintock was in fact a negligent and unfit person to be intrusted with the duties of the conductor of a train; and, second, whether the company, under the rules that I have already indicated to you, had notice of the fact of his unfitness or his negligence before the time of this accident and continued him in their service notwithstanding such notice."

18. The court erred in charging the jury as follows: "The law upon this subject, gentlemen, is that if one employee of a railroad company discovers that a co-employee of his is negligent or unskillful it is his duty to give notice to the company, but it is not necessary that he should at once quit the service of the company. After having given notice he may continue in the service of the company for a reasonable time, in the expectation that the company will take the proper action in the premises and discharge the unworthy and incompetent person; and if, within this reasonable time, and
75 before the objectionable person has been discharged, the party is injured by the negligence of the person complained of, the company is liable."

19. The court also erred in charging the jury as follows: "And I say to you that two or three or four weeks would not, in my judgment, be considered an unreasonable time in which, under all the circumstances, a party might delay for the action of the company upon such complaint having been made."

Wherefore, and because of the said errors, said defendant prays for a reversal of the said judgment.

LOCHREN, McNAIR & GILFILLAN,
Atty's for Defendant.

76 (Endorsed:) U. S. Circuit Court, district of Minnesota. Duane O. Ross *vs.* The Chicago, Milwaukee & St. Paul Railway Co. Assignment of errors. Lochren, McNair & Gilfillan, att'ys for def't. Filed August 31, 1881. H. E. Mann, clerk.

(Endorsement on cover:) Minnesota. C. C. U. S. No. 302. The Chicago, Milwaukee and St. Paul Railway Company, plaintiff in error, *vs.* Duane O. Ross. Filed 24th September, 1881; 75 pages.

112-377

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1883.
No. 302.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Plaintiff in error.

vs.

DUANE O. ROSS, *Defendant in error.*

Error to the Circuit Court of the United States for the District of Minnesota.

APPELLANT'S BRIEF.

JOHN W. CARY,
Of Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 302.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Plaintiff in error.*

vs.

DUANE O. ROSS, *Defendant in error.*

Error to the Circuit Court of the United States for the District of Minnesota.

The judgment in this case was rendered in an action by Duane O. Ross, against the plaintiff in error, to recover for injuries sustained by him on the 6th day of November, 1880, while in the employment of the plaintiff in error, as a locomotive engineer, engaged in running a freight train from the city of Minneapolis, to the city of Hastings, in the state of Minnesota, caused by a collision of said train with a gravel train on the said road running in an opposite direction.

The complaint, after setting forth the employment of the plaintiff, and that the time of the starting of his train was one o'clock and fifteen minutes A. M., states that one Hugh McClintock, was the conductor of said train, and that it was the duty of said conductor to exhibit to the plaintiff, as the engineer of said train, any and all orders which he, said McClintock, might receive in regard to the running and operating of said train, and especially all orders by which said train was required to wait for other trains.

The complaint further states that before said train left Minneapolis, the said conductor received from the train despatcher, and duly receipted therefor, an order directing him to hold the train of the said plaintiff at South Minneapolis for the passage of a wild gravel train, then coming from the direction of Hastings, to the city of Minneapolis. That said conductor neglected to exhibit said order to said plaintiff or to inform him of its contents, and neglected to give any directions to stop said train at South Minneapolis, and that in consequence of such neglect his train came into collision with said gravel train, and thereby he suffered serious injury, and alleges that the said conductor was guilty of gross negligence and carelessness, which caused said injury; and further alleges that said conductor was a negligent, unskillful and improper person to be employed as a conductor or in any other employment incident to the operation of a railroad, which the defendant well knew at the time of hiring said McClintock; further alleges that McClintock while in the employment of the defendant as such conductor, was habitually negligent, as the defendant also well knew and had repeated notice of. The complaint further alleges that the cut in which said accident happened was a dangerous and unsafe place, as the defendant well knew, and that the defendant negligently omitted to keep the same guarded, or to provide any means by which the plaintiff could be warned of the dangers, and that his injuries were caused by the negligence of the defendant in retaining in its employment the said McClintock as conductor, after knowledge and notice of his incompetency, carelessness and habitual negligence.

The answer admits the employment of the plaintiff and his injuries, but denies that it was guilty of any negligence that caused said injuries; denies that said McClintock was a negligent, unskillful or improper person to be employed as conductor or in any other employment incident to the operation of a railway, and denies that the defendant had any knowledge or notice that he was so negligent, unskillful or an improper person to have the conduct of such train; and further denies that the place where said accident occurred was a dangerous or unsafe place; and generally denies all allegations of negligence on the part of the defendant which caused said injury.

(Record, pages 2-12 inclusive.)

The cause was tried before the Hon. George W. McCrary, Circuit Judge, on the 22d, 23d and 24th days of June, 1881. The bill of exceptions showed, among other things, that the rules of the company required that all orders from the train despatcher should be delivered to the conductor before the starting of the train, who should sign a receipt for the order, setting forth its substance and signifying that he understood the order, and that the conductor should before starting the train, show such order to the engineer for his guidance. It further appeared that for nearly a week prior to this accident, a gravel train had been run by defendant from Mendota to Minneapolis, and that plaintiff's train had during that time, by order of the train despatcher delivered as aforesaid, been stopped upon sidings or side tracks at South Minneapolis and elsewhere between Minneapolis and Mendota, for the passage of such gravel train. That on the morning of the 6th day of November, A. D. 1880, and before the time of moving plaintiff's train from Minneapolis, an order from the train despatcher, directing that plaintiff's train be stopped and held upon the siding at South Minneapolis until the gravel train from Mendota should pass that place, was duly delivered to McClintock, the conductor of plaintiff's train, and duly receipted for by him, and that such order was not communicated to the plaintiff by said conductor or any one. That the conductor went into the caboose and fell asleep, soon after or about the time of starting. No halt was made at South Minneapolis, and the train passed on by Minnehaha Station, reaching a down grade at a speed of fifteen miles or upwards per hour, with no brakes set, and entered a deep, narrow cut three or four hundred feet in length, through which the railroad passes at a considerable curve. That when the plaintiff discovered the approaching train, he whistled for brakes and reversed, but the collision occurred almost immediately, by which he was severely injured.

(Record, pages 21–23.)

The plaintiff, for the purpose of showing negligence of the conductor at other times, and the knowledge thereof of the company, introduced testimony tending to show that in October, 1880, upon defendant's railroad, near the city of St. Paul, in a freight train upon which said McClintock was then conductor, a car containing live stock and furniture took fire and was burned to such an extent as to destroy a portion of the freight, and that thereupon when the train reached the water tank at St. Paul, where the fire was extinguished, the said conductor was summarily suspended from his functions by Mr. Case, the assistant superintendent, who was present. There was no evidence as to the cause of the fire, save the surmise of the witness that it might have been caused by sparks from the engine. The plaintiff also introduced testimony tending to show that on the 12th day of October, 1880, it was necessary for him to side track his train at Langdon; he had about thirty cars, mostly loaded, with a caboose in the rear and one next the engine; that the grade was descending; that on approaching the station, he gave a prolonged whistle, the usual signal of reaching a station, but finding that no brakes were applied he whistled the signal for brakes five times, and finding no brakes applied, he sent back his fireman, who set fifteen or eighteen brakes and stopped the train nearly a mile beyond the station; that about the time the train stopped, McClintock came out of the forward caboose and the three brakemen appeared, all having the appearance of having been sleeping. The testimony further tended to show that the proper place for the conductor was in the rear caboose, and that it was the duty of the brakemen to respond to the signal for brakes, without waiting for orders from the conductor. The testimony further showed that on the same day the plaintiff mailed from Hastings to J. O. Pattee, the master mechanic at Minneapolis, a letter as follows:

"*Chicago, Milwaukee & St. Paul Railway,*
Hastings Station, October, 12th, 1880.

J. O. PATTEE,

Dear Sir: The conductor and brakemen of train No. 8, between Hastings and Minneapolis, were fast asleep when we arrived at the mile board at Langdon. I shut off steam and whistled four times for brakes and had to send my fireman to brake the train. He set up eighteen brakes before we stopped, and that was one mile through the station.

Respectfully
DUANE O. ROSS."

That soon afterwards and before the 16th of October, the said Pattee passed said letter over to Mr. Williams, the train despatcher, and called his attention to the matter, and that Williams made inquiries about the the same matter, of plaintiff, who told him the same facts and expressed his opinion to Williams, that McClintock was not a safe man to run with, and his wish and purpose not to run with him, and that said letter was passed over by Williams to Mr. Underwood, the assistant superintendent. The plaintiff, being a witness, stated that at the time of his conversation with Williams, he also had a conversation with Mr. Pattee, and was asked by his counsel the following question:

Q. "And what did you tell Mr. Pattee on that occasion?"

This was objected to by the counsel for the defendant as incompetent, it not appearing that Pattee had authority to act for the defendant in the matter. The court overruled the objection, and the defendant duly excepted to the ruling.

The witness answered that he spoke to Pattee about McClintock; that he, plaintiff, did not get along well with him and wished Pattee to give him another run; that Pattee laughed and said: "I would not let a boy put me out of a job," and said he would make different arrangements some way—shift plaintiff around some way.

The plaintiff also introduced testimony tending to show that four days before the accident, Oscar Lyke, a locomotive engineer, was by the train despatcher ordered to follow, with his engine, plaintiff's train from Minneapolis to St. Paul, and was notified that plaintiff's engine would carry red lights as a signal that an engine was following, and that orders to same effect were, before the plaintiff's train started, given to and receipted by McClintock; that in fact McClintock never showed such orders to the plaintiff, but plaintiff being informed of it by Lyke before reaching Fort Snelling, hung out lights, without orders from the conductor, and that on passing Mendota, the gravel train stood by the switch ready to move out when plaintiff's train passed. The only evidence tending to show that any notice of this last negligence of McClintock, had been given the defendant was contained in a deposition of Oscar Lyke, who testified that he had related the matter to J. S. Ryan, train despatcher, at the company's office, at Minneapolis, and that Mr. Williams and Case were present; and respecting the time he said: "This talk was the same day when Ross was hurt at night. It was in the morning or forenoon before he was hurt." And further respecting such conversation with Mr. Ryan, he said: "Then Mr. Case stepped in and inquired into business. I told him the circumstances that had transpired. He said: It is a d—d poor time to make any report about this now."

The plaintiff also introduced as a witness, James S. Burgett, who was rear brakeman on plaintiff's train, and his testimony tended to show that on the night of the accident, McClintock was asleep from soon after leaving Minneapolis until the collision took place. The counsel for the plaintiff asked the following question:

Q. "What were McClintock's habits as to being awake or going to sleep, or being asleep, when you arrived at stations?"

This question was objected to by defendant's counsel as incompetent, unless notice to the company or its officers was shown. The objection was overruled by the court, and the defendant duly excepted.

The witness answered: "Well, his habit, as a general thing, was to be asleep." The witness further stated that he had never made complaint to the superintendent or other officer, of this conductor going to sleep.

Charles H. Prior, superintendent, sworn for plaintiff, was asked the following question:

Q. "Do you know whether it was the custom of railroads to require orders for the movement of trains, to be addressed both the conductor and engineer?

Objected to (1st) as incompetent, and (2d) because the plaintiff knew the custom of this road. Objection overruled. Defendant excepted.

The witness answered: "Different roads have different rules. I know roads where they have rules where they address directions directly to the engineer and also the conductor."

Q. Which do you consider the safest and most prudent?

Objected to by defendant. Objection overruled. Defendant excepted.

The witness answered: "I think that rule a little better than the other, although we worked the other for a number of years."

The witness further testified that the rule of this company giving the train despatcher's order to the conductor and requiring him to communicate them to the engineer, had been in use on the defendant's road from its commencement up to this accident, fifteen to twenty years, and was still the rule east of the Mississippi River, and was the custom most commonly used. Thereupon the plaintiff's counsel asked the same witness the following quuestion:

Q. "But the new system prevails in your jurisdiction, don't it?"

Defendant's counsel objected. Objection overruled. Defendant excepted.

The witness answered that it had since November 9th, 1880, requiring such orders to be given to and receipted by engineers as well as conductors. It was further shown that all employes on moving trains, including engineers and firemen, were under the control of the train despatcher, and that the master mechanic had nothing to do with them.

No other evidence of any negligence on the part of said conductor McClintock, nor of any notice to the defendant or any of its officers of any negligence of said McClintock, nor of any negligence on the part of the defendant or any of its officers, was introduced upon said trial. The plaintiff thereupon rested.

The defendant moved the court to instruct the jury to return a verdict for the defendant. 1st. Because the negligence, so far as any was proven, was that of a fellow servant of the plaintiff, for which his employer is not responsible. 2d. That the evidence shows such contributory negligence on the part of the plaintiff as must defeat his right to recover.

The court denied the motion. Defendant excepted.

The defendant then proved by John S. Ryan, its train despatcher, that the conversation with Oscar Lyke, mentioned in his deposition, occurred on the morning of the day following the accident wherein plaintiff was injured, and that neither said Ryan nor said Case had any notice or knowledge of any of the alleged negligence or misconduct of said McClintock, testified to by said Lyke, until after said accident.

The defendant also called as a witness Frederick D. Underwood, the assistant superintendent of that division of defendant's railroad, and he testified that in October, 1880, as such assistant superintendent, he had investigated the charges made against said McClintock by the plaintiff, contained in plaintiff's said letter to Pattee, in connection with the running of plaintiff's train passed Langdon Station, and heard the statements of both plaintiff and said McClintock respecting that matter, and upon such investigation came to the conclusion that said McClintock had not committed any negligence or breach of rule sufficient to cause him to be discharged.

The defendant's counsel asked said witness the following question:

Q. Did that investigation develop the fact as to who was to blame for running by Langdon?

Objected to by plaintiff's counsel as incompetent and calling for a conclusion. The objection was sustained by the court and the defendant excepted.

Q. After making this investigation, was the action of the company in accordance with such recommendation as you may have made?

Objected to by plaintiff's counsel. Sustained. Defendant excepted.

Defendant introduced further testimony of Chas. W. Case, assistant superintendent, in relation to the transaction at the water tank at St. Paul when the car was burned, who stated that he on that occasion suspended McClintock until he could investigate the matter; that he, the said Case, did investigate the matter himself, and thereby satisfied himself that McClintock had done what was proper, and thereupon reinstated him as conductor.

Defendant introduced the testimony of several officers and employes tending to show they were acquainted with McClintock and his reputation, prior to said accident, and that up to that time his general reputation as a conductor was good.

(Record, pages 21–29.)

The court charged the jury that the plaintiff and McClintock, the conductor, were not fellow servants or co-employes; that where the company places one of its employes under the control and direction of another, the two were not fellow servants engaged in the same common employment; that the rule of the company requiring running orders to be delivered to the conductor and that he show them to the engineer, made the engineer subordinate to the conductor, and that in delivering or showing the running orders to the engineer the conductor was the superior of the engineer, and that he stood in the place and stead of the company and was for that purpose a vice principal, and that if the accident complained of, was the result of the negligence of the conductor in failing to deliver the running orders to the plaintiff on the night of the accident, the plaintiff must recover, unless his own negligence caused or contributed to the injury. The court further charged the jury that if the company ignorantly or without notice employed an incompetent or improper servant, and afterwards were advised or had notice of the fact of his character for incompetency or negligence, it was the duty of the company to discharge him, and if they continued such person in their service as conductor, after notice, they became liable for any damage that the plaintiff might sustain through the negligence of the conductor. The court further charged that if the plaintiff communicated certain facts by letter to the master mechanic and the master mechanic laid the letter before the assistant superintendent, who acted upon it so far as to institute an investigation concerning it, that was sufficient notice to the company, and that the company could not protect itself from the consequences of the negligence of the conductor after such notice, by showing that they instituted an investigation of the matters communicated in the letter, and on such investigation found that the conductor was not guilty of the negligence charged, and that if the company continued such conductor after such notice and investigation believing him to be competent and faithful, yet they were bound, by the fact, whatever the fact might be; that the letter put them upon inquiry, and that as to the rights of other employes they could not shield themselves upon the ground that they did not believe in the truth of the charges that were made against him, and that he was acquitted on investigation. "*So that upon this branch of the case, gentlemen, you are simply to inquire: 1st. Whether McClintock was in fact a negligent and unfit person to be entrusted with the duties of a conductor of a train: and 2d. Whether the company, under the rules that I have already indicated to you, had notice of the fact of his unfitness or his negligence before* *the time of this accident, and continued him in their service notwithstanding such notice."*

The court further charged as follows: "*The law upon this subject is, gentlemen, that if one employe of a railroad company discovers that a co-employe of his, is negligent and unskillful, it is his duty to give notice to the company. But it is not necessary that he should at once quit the service of the company. After having given notice, he may continue in the service of the company for a reasonable time, in the expectation that the company will take the proper action in the premises and discharge the unworthy and incompetent person, and if within this reasonable time, after notice has been given and before the objectionable person has been discharged, the party is injured by the negligence of the person complained of, the company is liable. And two, three or five weeks would not, in my judgment be considered an unreasonable time in which, under all the circumstances, a party might delay for the action of the company upon such complaint having been made.*"

ASSIGNMENT OF ERRORS.

First. The court erred in charging the jury that the plaintiff, the engineer, and McClintock, the conductor, were not fellow-servants or co-employes engaged in the same general business.

Second. The court erred in charging the jury that the defendant was guilty of negligence in not discharging McClintock on receipt of Ross's letter making certain charges, notwithstanding the charges on investigation were found untrue and not sustained.

Third. The court erred in charging the jury that it was not necessary for the plaintiff, on discovering that McClintock was an improper person to have charge of a train, to refuse to run with him or quit the service, and that he might continue for two, three or five weeks after making such discovery.

Fourth. The court erred in its rulings in admitting testimony of the plaintiff.

Fifth. The court erred in its rulings in rejecting testimony of the defendant.

I.

The court erred in charging the jury that the plaintiff, the engineer, and McClintock, the conductor, were not fellow servants or co-employes engaged in the same general business.

This charge was prior to the decision of this court at the present term in *Randall v. The Baltimore & Ohio Railroad*, and is in direct conflict with it. That was an action by a brakeman for an injury received through the alleged negligence of the engineer of another train of the same company. The court say:

> "Nor is it necessary, for the purposes of this case, to undertake to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh the conflicting views which have prevailed in the courts of the several states; because persons standing in such a relation, to one another as did this plaintiff and the engineman of the other train, are fellow servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the House of Lords, and in the English and Irish courts. They are employed and paid by the same master. The duties of the two bring them to work at the same place, at the same time, so that the negligence of one in doing his work may injure the other in doing his work. Their separate services have an immediate common object, the moving of trains."

This language clearly implies that all train men engaged in moving trains, are fellow servants engaged in the same general employment. This decision is in accordance with the general current of authority in the several states. We are not aware that it has ever been seriously disputed that train-men, including the conductor, engineer, fireman, brakemen and baggage-men were fellow servants of the same master, engaged in the same general employment. It follows from this premise, that neither of these parties can maintain an action against the common master for any injuries sustained while in the service, caused by the negligence of either of the others. Such is the effect of their contract with the master. In *Hough v. Ry. Co.*, 100 U. S. Rep., 217, this court say:

> "It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation; among which is the carelessness of those, at least in the same work or employment, with whose habits, conduct and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest".

And in the case of Randall, above cited, this court say:

> "Each, by entering into this contract of service, takes the risk of the negligence of the other in performing his service, and neither can maintain an action, for an injury caused by such negligence against the corporation, their common master."

This rule was announced by Chief Justice Shaw, in 1842, in *Farwell v. Boston & Worcester Railroad Co.*, 4 Metcalf, 36, and has been generally adopted by all the states, and is the rule in the English and Irish courts.

The rule now established in England, and generally in this country, is, that the term, fellow servant, includes all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it.

Wonder v. Baltimore R. R. Co., 32 Maryland, 411.
Wilson v. Merry, Law Rep., 1 H. L. Scotch Ap., 326.
Columbus & Indiana R. R. Co. v. Arnold, 31 Indiana, 174.
Warner v. Erie Ry. Co., 39 New York, 470.
Hard v. Vermont & Canada R. R. Co., 32 Vermont, 480.

The court below, while seeming to admit the general proposition above stated, claimed that there were exceptions to it, and in its charge formulated an exception thereto as follows: "*It is very clear I think that if the company sees fit to place one of its employes under the control and direction of another, that then the two are not fellow servants engaged in the same common employment within the meaning of the rule of law.*

This we submit is not the law on this subject. Wharton in his Law of Negligence, section 229, says:

"It makes no difference that the employe receiving the injury is inferior in grade to the one by whose negligence the injury was caused."

Wood's Law of Master and Servant, section 437, is substantially the same.

Cooley on Torts, pp. 543-4, says:

"It cannot be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts or omissions on the part of one class of servants and not those of another class. Nor on grounds of public policy could the distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public who, in their dealings with the employer, may be subjected to risks."

Again on page 562, he says:

"It has been seen that the superior position of the negligent servant, as that of a foreman, conductor, &c., is not regarded as affecting the case."

And Sherman & Redfield on Negligence, section 100, after stating that it makes no difference whether the employes were equal, inferior or superior, say:

"The fact that the injured servant was under the control of the servant by whose negligence the injury was caused makes no difference."

It is true that the states of Ohio and Kentucky, seem not to have followed this rule; but the general current of authorities, both in this country and in England, is as above stated. We cite the following from the great mass of authorities on the subject:

Laning v. N. Y. C. R. R. Co., 49 N. Y., 521, 528.
Malone v. Hathaway, 64 N. Y., 5, 8.
Crispin v. Babbitt, 81 N. Y., 516.
Lawler v. Androscoggin R. R. Co., 62 Me., 463.
Blake v. Maine Central R. R. Co., 70 Me., 60.
Lehigh Valley Coal Co. v. Jones, 86 Pa. St., 432.
Brown v. Winona & St. Peter R. R. Co., 27 Minn., 162.
Peterson v. Coal & Mining Co., 50 Iowa, 673.
Wilson v. Merry, L. R. 1 H. L., Sc. App., 326.

The judge further instructed the jury:

That by the rules and regulations of the company, "conductors must, in all cases, while running by telegraph and special orders, show the same to the engineer of their train before leaving stations where the orders are received. The engineer must read and understand the order before leaving the station. By this general order, gentlemen, as I understand and construe it, the company made the engineer, in an important sense, subordinate to the conductor. By it the conductor was made the medium through whom and by whom the company communicated its orders touching the running of trains to the engineer. The company saw fit to make him their agent and representative for this purpose and to require plaintiff to receive its orders in this way. I am of opinion that in respect to the duty of delivering or showing the running orders to the engineer, the conductor was the superior of the engineer; that he stood in the place and stead of the company, and was, for that purpose, a vice principal. It follows from this, that if the accident complained of was the result of the negligence of the conductor in failing to deliver the running orders to the plaintiff on the night of the accident, the plaintiff must recover, unless his own negligence caused or contributed to the injury."

We again respectfully submit that the Honorable Circuit Judge did not correctly state the law in the foregoing charge. By the rule mentioned, the company did not make the conductor a vice principal, nor did it make the engineer in any sense subordinate to the conductor. It is true that the conductor was made the medium through which the orders of the company were conveyed to the engineer, but that did not make him a vice principal, nor did it subordinate the engineer to the conductor. The order changing the time table or the time of the running of a particular train emanates from the train despatcher from one of the principal offices of the company. By him it is sent by telegraph to the operator at the point where the conductor is to receive it. The duty of the operator receiving it is to make a fair copy thereof and deliver it to the conductor, taking his receipt therefor. And if the charge above quoted is correct law, then the operator receiving the order by telegraph from the train despatcher must also be considered a vice principal and must also be a superior, and both the conductor and engineer his subordinates, for he performs precisely the same duty with respect to the conductor that the conductor performs with the engineer. This does not make him the superior of either of them, and they are not his subordinates. He gives neither the conductor nor the engineer any orders. He has no control over them. His simple duty is to receive the telegraph message, transcribe it and deliver a copy of it to the conductor. It then becomes the duty of the conductor to show the order so received to the engineer, before leaving the station where the order is received, so that the engineer may read and understand the order before leaving the station. The order is the order of the train despatcher, and the duty of the operator is to receive it from the telegraph, transcribe and deliver to the conductor, and the conductor's duty is to exhibit it to and allow the engineer to read it. This does not make either of them the subordinate of the other. Neither of them has any power to alter or modify the order, or to give any order. It is the duty of the operator to receive, transcribe and deliver the order to the conductor. It is then the duty of the conductor to present it to the engineer in order that he may read and understand it. And the charge of the court below that either of these parties in performing these acts is made a vice principal is not in accordance with the fact nor in conformity to the law applicable thereto.

The case of *Slater, administrator, v. Jewett*, 85 New York, 61, is a case in point. This was an action by the administrator of Slater, who was a fireman and was killed by the collision of two engines, each drawing a train of cars on the Erie Railroad. The immediate negligence that caused the collision, was that of the conductor of the train meeting the one on which Slater was serving, co-operating with that of the telegraphic operator at Salamanca, one of the stations of the road. It appears that the rule of the company in that case required the operator to deliver to the conductor and engineer orders received from the train despatcher and take their receipts therefor. But in this case he delivered it to the conductor, who signed the engineer's name to the receipt and then failed to communicate the order to the engineer, in consequence of which the collision occurred. On page 69, the court say:

> "Each of those agents, in doing their ordinary work for the defendant, were fellow servants of the intestate, in the same common employment. The conductor was engaged in the particular work in which the intestate was—that of moving of trains. The telegrapher was engaged in a work closely connected therewith—that of receiving and giving information of the whereabouts of trains and communicating orders to those controlling them for stopping or going on.' * * * * * * It cannot be contended that there was anything required of the conductor that raised him out of his relation to the intestate of a fellow servant. The act required of the conductor, at the particular time, was to receive an order from an authorized source of command, and in a prescribed mode to acknowledge the receipt of it, and then to follow the direction. This was service merely. It is contended that the duty of the telegrapher at the time, and the act required of him, were those that the defendant was bound to perform as master, and that the negligent performance by the operator was the negligence of the master."

The Chief Justice, after discussing this question, says the master has the right, as regards his servants, to vary from the time table he has set, and that the risks arising from it are among those that railway employes are bound to expect in the course of their employment, and all that can be required of the master is that he will use due care and diligence in giving notice of the change and in running the train upon the changed time; that the master may make suitable regulations in regard to such changes, but the carrying them out is matter of executive detail which must be entrusted to employes. The master is not obliged to see personally that the order for these changes is communicated to every employ affected thereby, and the case holds that the act of the operator in receiving the despatch and delivering the same to the conductor, and the act of the conductor in delivering the same to the engineer, were acts of employes and not of the master, and any negligence on the part of either was the negligence of a co-employe or fellow servant, and not the negligence of the master.

In *Robertson v. Terre Haute & Indianapolis R. R. Co.*, 78 Indiana, 77, train No. 14 was running westward, according to the rules and regulations of the company; train No. 19 was running eastward, about an hour behind time, and not in accordance with the rules of the company; a collision occurred, and the head brakeman on No. 14 was injured; judgment was rendered for the company, and on appeal the appellant insisted that the reasonable inference from the evidence was that the collision of the trains was due to the negligence of the appellant's train dispatcher; that had he notified the conductor of train No.

19 of the time of the departure of train No. 14 from Indianapolis and given him proper directions the accident would not have occurred. The court say:

"Conceding that the evidence tends fairly to show that the appellant's injury was due to the negligence of the appellee's train dispatcher, the question arises, was the appellee's train dispatcher the co-servant of the appellant? If they were fellow servants the appellant cannot recover."

The court held that he was a co-servant of the brakeman, and say:

"If the duties discharged by each relate to the same general object they must be held to be fellow servants. It is enough if they are employed for the purpose of effecting the same general object."

In *Chicago, St. Louis & New Orleans R. R. v. Doyle*, 8 American and English R. R. cases 171, Doyle, an engineer, was drawing a pay car, running on orders from the train dispatcher. He had orders from the train dispatcher as follows: "*Run to Jackson avoiding regular trains. Meet No. 6 at Michigan City.*" On arriving at Michigan City he received a further order from the train dispatcher: "*Meet No. 6 at Grand Junction, instead of Michigan City.*"

No. 6 was a regular train, running on its regular time and started from Jackson, Tennessee, on the same morning, with the following orders: "*All trains past due at Jackson are abandoned. Get orders at Grand Junction.*" On arriving at Grand Junction No. 6 found no orders, and proceeded without orders on its regular time. The collision occurred between Grand Junction and Michigan City. The court held that the conductor and engineer of No. 6 were in fault; that they were co-employes of Doyle, the person injured, and that no recovery could be had against the company.

Second. The above charge was erroneous for another reason. By the rules of the defendant all orders for the running and operating of trains were to be delivered by the train dispatcher to the conductor, who was to receipt for the same; and it was the duty of such conductor to show and of the engineer to read the same before leaving the station at which such order was received. The plaintiff was fully aware of this regulation of the company, which had been in force from the time of its organization. He accepted it as one of the regulations of the company by which he was to be bound, and cannot now be heard to complain that it was not the best regulation that could have been made. He cannot be heard to object that the company should have had a different rule upon the subject of delivering such orders.

"Really, by entering the employment with these rules in force, he did, in effect, agree that special orders might be so sent. The bargain between him and the defendant was not only that special orders might be given interfering with the general time table, but that they might be given in this way."

Slater v. Jewett, above, see p. 75. See also *Chicago, St. Louis & New Orleans Ry. v. Doyle*, above, p. 174; *Naylor v. C. & N. W. Ry.*, 53 Wis., 661 and cases cited, where the court say:

"Hence, if the servant, knowing the hazards of his employment as the business is conducted, is injured while employed in such business, he cannot maintain an action against the master for such injury merely because he may be able to show that there was a safer mode in which the business might have been conducted, and that had it been conducted in that mode he would not have been injured."

Michigan Central R. R. Co. v. Smithson, 45 Mich, 212; S. C., 1 Am. & Eng. R. R. Cases, 101 and note of cases cited; *Clark v. R. R. Co.* 28 Minn., 128; S. C., 2 Am. & Eng. R. R. Cases, 240; *Ladd v. R. R. Co.* 119 Mass., 412.

II.

The court erred in changing the jury that the defendant was guilty of neglegence in not discharging McClintock upon receipt of Ross' letter making certain charges, notwithstanding the charges on investigation were found untrue and not sustained.

The plaintiff claims that the conductor was an incompetent and careless person, unfit to be employed as a conductor of a train, and that this fact was well known to the defendant. There is no pretence that there was any want of care on the part of the defendant in the original employment of McClintock, or that the company had any knowledge at the time of his employment, that he was a careless or incompetent person for the business. But it is claimed that he was careless and incompetent and that this knowledge was communicated to the defendant prior to this injury and that it neglected to discharge him. The evidence relied upon to sustain this charge is as follows:

1st. That in April, 1880, a freight car in this conductor's train took fire and was partially consumed, and that Mr. Case, the assistant superintendent, who was present, summarily suspended him.

2d. That on the 12th of October, 1880, as plaintiff's train was passing Langdon Station, where it was to side track, plaintiff whistled for brakes, and that his call was not answered by the conductor or any of his three brakemen; that the fireman set the brakes, and that about the time the train stopped the conductor and three brakemen came out of the caboose, all having the appearance of having been asleep, that this plaintiff reported this fact by letter to the master mechanic, who delivered his letter to the train dispatcher and superintendent.

3d. There was evidence tending to show that the train dispatcher on a certain occasion gave orders that another engineer, Oscar Lyke, should follow plaintiff's train with his locomotive; that McClintock was notified of this fact, and that it was his duty to notify the plaintiff so that he could carry a red light as a signal that it was so following; that McClintock failed to notify his engineer of said fact, but that he was so notified thereof by said Lyke, and Lyke testified that he had related this circumstance to the train dispatcher in presence of the superintendent, in the office of the company, on the day prior to this accident.

The proofs showed that Case, the superintendent, investigated the matter of the cars taking fire and found that the conductor was not in fault, and on so finding restored him to his place. (*Record, folio 58.*) That the letter of Ross, in regard to setting the brakes at Langdon, was referred to assistant superintendent Underwood for examination, who investigated the matter and heard the statements of the plaintiff and McClintock respecting it, and came to the conclusion that McClintock had not committed any negligence or breach of rules sufficient to cause him to be discharged, (*Record, folio 56*). It was satisfactorily proved that the report of Lyke to Ryan and Case in the office of the company, above referred to, was on the morning of the accident and after it had occurred, and not before, (*Record, folio 55*).

On this evidence the court charged the jury, in substance, that it was the duty of the company to regard this letter of the plaintiff as proof positive that McClintock was a careless and incompetent man to have charge of a train; and notwithstanding the company by its proper officer investigated the charge as made by Ross and came to the conclusion that it was not sustained, yet that the defendant must be regarded as having knowingly employed or kept in its employment an incompetent, careless and improper man as conductor of its train. In other words, that a charge made by any employe of the company against another employe must be accepted as proof conclusive by the company that the employe complained of, was a negligent and improper person and unfit to be employed. If such is the law there would be no object to be obtained by making an investigation of the conduct of employes on any occasion, but whenever notice was given to the company of any dereliction of duty, however slight, it would be the duty of the company to discharge the person complained of on pain of being adjudged to have kept in its employment a careless and improper person. In other words, a charge however slight, or however unsupported, must be followed by judgment and dismissal at once, in order to protect the company in case of any subsequent misconduct of the party. We cannot believe that such an unjust, cruel and illogical rule has a place in our jurisprudence, which boasts of being founded upon reason and justice On the contrary, we insist that while it was proper for Mr. Case, in the discharge of his duty, to suspend Mr. McClintock on the occasion of the occurrence of the fire, it was his duty, as a just and honest superintendent, to investigate the matter, and if he found the conductor not in fault to restore him to his position. So in regard to the failure to set brakes at Langdon, it was the duty of the proper officers of the company to investigate the charge made, and the circumstances attending it, and decide it according as the facts appeared, and not to dismiss the conductor on that account, unless satisfied on an investigation that he had been guilty of sufficient wrong to cause his dismissal, and that such charges made and the investigations had upon them were not necessarily evidence or notice to the company that he was an improper or unsafe man to act as conductor, and the fact that such things had occurred cannot be considered as fixing upon the company, under the circumstances, knowledge that he was an improper person to be employed. The investigation of the officers of the company showed the contrary. Any other rule would make all investigations into the conduct of employes useless, and would place the faithful servant, guilty of no wrong, upon the same plane with the careless and negligent, in regard to the action of the company. The fact reported by the plaintiff was that the conductor and brakeman of his train did not respond to the whistle for brakes, and appeared to have been asleep when it arrived at the mile board at Langdon. That might or might not be evidence of carelessness or negligence on the part of the conductor.

In *Baulec v. N. Y. & Harlem R. R.*, 59 N. Y., 356, this precise question was in issue and was the only question in the case. McGerty, a switchman, had misplaced a switch, by which the plaintiff's intestate lost his life. Six or seven months previously a train had been thrown from the track by a misplaced switch while McGerty was in charge, which the plaintiff claimed was caused by his carelessness, want of attention or mistake; and it was contended that the company was liable for keeping him in its employment after the first occurrence. Justice Allen, in delivering the opinion of the court, on page 363, says:

> "If it be conceded that the negligence of McGerty upon the prior occasion is established, it by no means follows that the defendant was bound to discharge him upon peril of being charged with neglect and

a want of due care in retaining him in its service. An individual who by years of faithful service has shown himself trustworthy, vigilant and competent is not disqualified for further employment, and proved either incompetent or careless and not trustworthy, by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind. The fact would only show what must be true of every human being, that the individual was capable of an act of negligence, forgetfulness or error of judgment. This must be the case as to all employes of corporations until a race of servants can be found free from the defects and infirmities of humanity."

And, again on page 364, he says:

"But this appeal does not necessarily depend upon the correctness of this view of the effect to be given to a single instance of neglect. All that the corporation defendant was bound to do, after the occurence, was to enquire into it, and ascertain the facts, and act in the discharge or retention of the switchman with reference to the facts as ascertained, as reasonable prudence and care should dictate, and if such care and caution was exercised, the company is not liable although its general agent erred in judgment in retaining the switchman in the same service. Ordinary care and a reasonable exercise of discretion and judgment is all that is necessary to absolve the corporation from the charge of neglect of duty in such a case."

Again on the same page:

"This transaction and the agency of the switchman in causing the accident on that occasion, was investigated immediately thereafter, by the agent of the defendant whose general duties included such investigation, and who was authorized to employ and discharge switchmen at that point. He had the statement of the switchman himself, and in this record we have his sworn statement of the same transaction, and assuming as we must that the facts disclosed upon this trial were made known to the agent and representative of the defendant, then it was certainly a question of doubt whether the fault of that accident was upon the switchman or the engineer in charge of the train that was thrown from the track. * * * * * * *
The corporation might well come to the conclusion that the misplacing of the switch on that occasion, was not a negligent or careless act on the part of the switch tender. And if a reasonable man might infer that the switchman was careless, or acted unadvisedly and without proper caution, it does not follow that general carelessness and imprudence can be inferred from this single act in a man as to whose conduct on other occasions there could be no imputation of negligence or inattention, or that a want of reasonable care could be inferred on the part of the corporation in retaining him. To justify a recovery by the plaintiff from this single instance there must be inferred not only the carelessness as a characteristic of the switchman and his consequent unfitness for that particular service, but the want of due care in the corporation in investigating the occurrence and determining upon the retention of the man. * * *
The question in this case was, whether the single occurrence detailed by the witness, in connection with other circumstances and with his general character and conduct, was such as to make it necessary for

the defendant in the exercise of proper care and prudence, such as the law enjoins, to discharge this switchman. I am clearly of opinion that there was not sufficient evidence to carry the case to the jury. A verdict against the defendant based upon this evidence would have been against evidence, and such being the case it was the duty of the court to nonsuit."

The doctrine of that case is in direct conflict with the charge of the court in this case. That case holds that it was the duty of the company to make an investigation of the charge and the circumstances attending the alleged negligence, and to decide and act in accordance with the results of such investigation. The charge in this case requires instant dismissal, notwithstanding the investigation discloses that the employe was guilty of no fault, on pain of being adjudged guilty of the want of ordinary care in continuing the conductor in the service of the company. The doctrine laid down in the case of Baulec is in accordance with reason, justice and proper business management, while the doctrine of the charge in this case is cruel and unjust to the employe against whom the charge is made, and in conflict with the rules that should govern in any well regulated business. There was but one act of alleged negligence brought to the attention of the defendant. There was not a scintilla of proof that the conductor was in any manner in fault in regard to the cars taking fire at the time alleged, and it was clearly proved that the occurrence testified to by Lyke, was brought to the knowledge of the superintendent after the accident in question. The only charge of negligence or incompetency, therefore, that was ever brought to the attention of the company was the occurrence at Langdon Station, mentioned in the letter of Ross to Pattee, which was investigated by the superintendent. The instructions of the court in fact deal only with this charge as showing that the unfitness of the conductor for his position was ever brought to the knowledge of the company, and one act of negligence of this character, was clearly insufficient to prove that the company was guilty of a want of proper care in retaining him in its employment. This charge was promptly investigated by the company, the statements of the plaintiff and McClintock both taken in regard to it, and after full consideration the charge was dismissed as not sustained. There was, therefore, no proof in the case to go the jury that the defendant had been guilty of a want of proper care and attention in retaining McClintock in its employment. The question, as to whether the defendant was guilty of negligence or a want of proper care in retaining McClintock in its service after knowledge that he was an unfit person to have charge as a conductor, was not submitted to the jury.

There was, in fact, no evidence upon which that question could have been submitted to them. In the language of Justice Allen above quoted, to justify a recovery by the plaintiff from this single instance, there must be inferred not only the carelessness as a characteristic of the conductor and his consequent unfitness for that particular service, but the want of due care in the corporation in investigating the occurrence and determining upon his retention. There is no dispute that the investigation was made in good faith and that the company's agents honestly arrived at the conclusion that McClintock was not guilty of the negligence charged by plaintiff, after hearing the statements of the plaintiff and McClintock.

The special questions submitted to the jury were: "1st. "*Was McClintock, the conductor, a person of negligent habits and character?* 2d. *If so, had the defendant notice of the negligent character of said conductor long enough before the accident to have discharged him prior thereto?*

There was no proof in fact that McClintock was a person of negligent habits and character prior to his action at the time of the injury complained of. There was only proof that he failed to respond to the whistle for brakes at a certain time when his train arrived at Langdon, and the opinion of the engineer that he was asleep at the time. This was the only negligent act ever reported to the company. An investigation of this act was had by the proper officer, and after hearing the plaintiff and McClintock on the subject it was decided that the charge was not sustained and that he had not been guilty of any negligence calling for his dismissal. This was the only testimony before the jury, yet the charge of his honor the circuit judge was, in substance, that this charge made by Ross was sufficient proof that he was negligent, and that if the company received Ross's letter and acted upon it, that was sufficient notice to them of that fact. The jury must have so understood the charge, and on that testimony and the charge, answered the question that he was a person of negligent habits and character, and that the defendant had notice of it long enough before the accident to have discharged him prior thereto. Taking the charge and the finding of the jury upon these points together, there can be no doubt that they understood the charge as holding that this failure to respond to brakes was sufficient proof of his negligent habits and character, and that if the company received the letter, they had sufficient notice thereof. In fact, the only question left to the jury under this charge, was the question of whether that letter was received by the company, which was not denied. We respectfully submit, not only that the charge was entirely erroneous upon this subject, but that there was no testimony upon which the jury could properly find the negligent habits or character of the plaintiff, and certainly none upon which they could find that the company had notice thereof in time to have discharged him prior to this accident.

In order to show that we are correct in our construction of the charge and the manner in which it was understood, we quote the following paragraphs of it: "*If it be true that he (plaintiff) communicated the fact by letter to the master mechanic* (that is, the fact that McClintock and his brakemen neglected to respond to the call for brakes at Langdon Station), *and the master mechanic laid it before the assistant superintendent, who acted upon it so far as to institute an investigation concerning it, that was sufficient notice to the company.*" What is the meaning of this language? Sufficient notice of what? Clearly the jury understood it that the court charged not that it was sufficient notice that McClintock failed to respond to the brakes, but sufficient notice that he, McClintock, was an improper person to have charge as conductor of the train, implying not only that the notice to the company was sufficient, but that the offence named was sufficient to brand him as a person of "negligent habits and character." Again, the court referring to this same letter, say:

"*I instruct you further, that the company cannot protect itself from the consequences of the negligence of the conductor after notice of his negligent character, by showing that they believed him to be competent and diligent, nor by showing that they instituted an investigation which resulted in his acquittal upon the charges of incompetency and negligence which were made against him.*" Again, when the only charge that had been made was that he was asleep on a certain day when they arrived at a certain station in the country, the court say: "*When the company was notified by another employe, that this conductor was a negligent and incompetent official, it continued him at its own risk, notwithstanding the fact that he was believed by the company to be competent; they were bound, in other words, by the fact, whatever the fact might be. They were put upon inquiry, and as to the rights of other employes, they cannot shield themselves upon the ground that they did not believe in the truth of the charges that were made against him.*" Again the court further say: "*So that, upon this branch of the case, gentlemen, you are simply to inquire, first, whether McClintock was in fact a negligent and unfit person to be entrusted with the duties of the conductor of the train; and second, whether the company, under the rules that I have already indicated to you,* *had notice of the fact of his unfitness or negligence before the time of this accident and continued him in their service notwithstanding such notice."* Clearly charging that if they believed that the plaintiff wrote the letter in question and that it came to the hands of the officers of the company, that that was complete and conclusive notice to the company that McClintock was an improper person to be employed as conductor. The fact that the matter stated in the letter might or might not be of gravity or importance sufficient to charge him with negligence, and the fact that it was thoroughly investigated and found not sustained, are wholly ignored; but the jury are in fact told that this letter was sufficient on that branch of the case to show that the incompetency of McClintock had been fully made known to the company. We most respectfully submit that such is not the law governing the case.

III.

The court erred in charging the jury that it was not necessary for the plaintiff, on discovering that McClintock was an improper person to have charge of a train, to refuse to run with him or quit the service, and that he might continue for two, three or five weeks after making such discovery.

Upon this point his Honor charged the jury that the law upon this subject is that if one employe of a railroad company discovers that a co-employe of his is negligent and unskillful, it is his duty to give notice to the company; that it is not necessary that he should quit the service of the company after having given notice, but that he might continue in the service of the company for a reasonable time, in the expectation that the company will take the proper action in the premises and discharge the unworthy and incompetent person, and if within this reasonable time, after notice has been given and before the objectionable person has been discharged, the party is injured by the negligence of the person complained of, the company is liable, and that two, three or five weeks would not in the judgment of the court be considered an unreasonable time in which, under all the circumstances, a party might delay for the action of the company upon such complaint having been made. We respectfully submit that this part of the charge is erroneous.

IV.

The court erred in its rulings in admitting testimony of the plaintiff.

It appeared that the master mechanic Pattee had nothing whatever to do with the employment of the men or the complaints for negligence, but it appeared that the letter written by Ross was by him transmitted to the train despatcher and came to the hands of the defendant. The plaintiff to maintain his case introduced in evidence, under the objection of the defendant, a conversation which he had with Mr. Pattee.

Q. And what did you tell Mr. Pattee on that occasion?

Objected to. Objection overruled. Exception taken.

The witness answered that he told Pattee about McClintock, that he did not get along well with him and wished Pattee to give him another conductor, &c.

This was clearly incompetent. Again, the witness Chas. H. Prior, superintendent of the road, after stating what the rules of the company were under which the plaintiff was working, was asked whether he had not subsequently to this accident adopted a rule that the train despatcher should deliver the running orders both to the conductor and the engineer, *which was received under objection;* also the question as to which he thought the better rule, *which was received under like objection.*

V.

The court erred in its rulings in rejecting testimony of the defendant.

Frederick D. Underwood, assistant superintendent of the defendant, was called and questioned as to the investigation made into the charges made by the plaintiff in his letter and the action of the company in relation thereto, *all of which was ruled out.*

The ruling in this case was doubtless on the idea expressed in the charge that the investigation into the charges made by the defendant was a matter wholly immaterial. The court, in its instruction to the jury, told them in substance that if an employe of the company made a report that a fellow employe was negligent in any particular, that that was sufficient to charge the party with notice of the fact that such employe was guilty of negligence and an unfit person, notwithstanding that the charge was wholly destitute of truth; and that an investigation by the company of the charge, however honestly conducted, would not excuse the company from fault in case of any subsequent misconduct of the employe so charged, and that in a suit for an injury occasioned by such subsequent misconduct the company must be held to have been guilty of negligence and a want of proper care in retaining in its employment incompetent and improper persons. If the charge was correct upon this point, this ruling was legitimate. But we submit that the charge in this particular was erroneous and that the company by instituting an investigation of the charge, when made in good faith, discharged its whole duty in the premises. In the language of Justice Allen, in Baulec v. R. R., above cited, we say all that the defendant was bound to do, after receiving Ross's letter, was to enquire into it and ascertain the facts, and act in the discharge or retention of the conductor with reference to the facts as ascertained, as reasonable prudence and care should dictate. And if such care and caution was exercised the company is not liable although its general agent erred in judgment in retaining the conductor in the same service. Ordinary care and a reasonable exercise of discretion and judgment is all that was necessary to absolve the corporation from the charge of neglect of duty in this case. The testimony of Underwood offered was, therefore, improperly ruled out. And we submit that for the several errors in the charge and the rulings of the court the judgment should be reversed.

JOHN W. CARY,
Of counsel for Appellant.

112-377

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JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

(No. 302.)

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Plaintiff in Error*,

vs.

DUANE O. ROSS, *Defendant in Error*.

BRIEF FOR DEFENDANT IN ERROR.

C. K. DAVIS,
Counsel for Defendant in Error.

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vs.

DUANE O. ROSS, *Defendant in Error.*

STATEMENT.

The defendant in error brought this suit to recover for personal injuries. He was a locomotive engineer in the employment of the railway company, and on November 6, 1880, was so employed on a regular freight train No. 28, running from Minneapolis, Minnesota, towards and beyond Hastings, Minnesota. It is averred in the complaint, (page 3, fols. 6, 7,) and is not denied by the answer, that this train always left Minneapolis at the regular schedule time of 1 : 15 o'clock A. M., and that it had the right of the road over such trains as the one with which it came into collision, except when the conductor of plaintiff's train and the plaintiff were otherwise notified and directed by the defendant.

The complaint alleges (page 3, fol. 7) that one McClintock was the conductor of this train; that it was his duty to have entire charge of running it; that it was especially his duty to carry and exhibit to the plaintiff, as engineer, any and all orders which he, McClintock, might receive in regard to running and operating it, especially all orders by which it was required to wait for other trains, and to cause his train so to stop and wait; that when such orders were given by the railway company they were given solely to McClintock, whose duty it was to inform the plaintiff thereof. This the answer substantially admits. (Page 10, fol. 24.)

The complaint (page 4, fol. 9) sets up the following regulations of the company then in force relative to running trains, viz.: "Conductors must in all cases, when running by telegraph and special orders, show the same to the engineer of their train before leaving station where the orders are received. The engineer must read and understand the order before leaving the station. The conductor will have charge and control of the train, and of all persons employed on it, and is responsible for its movements while on the road, except when his directions conflict with these regulations, or involve any risk or hazard, in which case the engineer will also be held responsible." These allegations are not denied.

The complaint also states (page 4, fol. 8) that at the hour when the train, so in charge of McClintock, was required by its time to leave Minneapolis, and when it did so leave, there was then coming towards Minneapolis, by order of the defendant and to its knowledge, a "wild" train,—that is, a train departing, arriving, and running on no schedule time and in the course of no regular trip; that it was a gravel train, and was known by the defendant to be coming towards Minneapolis from Fort Snelling over the same track upon which the train of the plaintiff was to run and did run. This averment is not denied. As to this train the bill of exception states (page 22, fols. 42, 43) "that for a week prior to such accident a gravel train had been run by the defendant, hauling gravel from a pit near Mendota to Minneapolis, in the night, for the construction of a new and separate line of defendant's railroad then being built between St. Paul and Minneapolis, and that plaintiff's freight train had, during that time, by order of the train dispatcher, delivered as aforesaid, (viz., to the conductor,) been stopped upon the sidings or side tracks at South Minneapolis, or elsewhere between Minneapolis and St. Paul Junction, for the passage of said gravel train."

It is also charged in the complaint (page 6, fol. 15) that the conductor, McClintock, was always a negligent, unskillful, and improper person to be employed as conductor, as the defendant well knew when it hired him, and always well knew, down to the time of the casualty, and that during his employment he was habitually negligent, as the defendant knew, and had repeated notice, in running trains operated by him and under his charge, and that in several instances not long before the casualty, in managing and running trains of the defendant as conductor, he was guilty of gross and repeated acts of negligence, of which specific acts of negligence the defendant had knowledge long before the casualty, but refused and neglected to discharge him.

It appears from the bill of exceptions (page 22, fol. 41 *et seq.*) that the plaintiff's train, which was No. 28, and was a regular train, leaving Minneapolis at fifteen minutes past one o'clock in the morning, passed by way of Fort Snelling across the Minnesota river at Mendota; thence passing to Saint Paul Junction, and crossing the Mississippi river to St. Paul; thence on the east side of the Mississippi river past Langdon station, recrossing the Mississippi at Hastings. In the year 1880 Charles H. Pryor was superintendent of the defendant's railroads in Minnesota; Charles W. Case was assistant superintendent of the same railroads, except that after the first day of October, 1880, Frederick D. Underwood was assistant superintendent of the river division, including the portion between St. Paul and Hastings. Henry R. Williams and J. S. Ryan were train dispatchers, and J. O. Pattee (misprinted Ruter and Patter) was master mechanic, having the right to hire and discharge engineers and firemen, and that these officers were all located at Minneapolis. The trains of this railroad were run under directions of train dispatchers. The plaintiff's train had the right of way on its schedule time, except when orders from the train dispatcher were received, directing its stoppage for the meeting or passage of other trains, or for other purposes.

Prior to the accident the rules of the company required that such orders from the dispatcher should be delivered to the conductor before starting the train, who should sign a receipt for the order, and setting forth its substance, and that he understood it, and that he should, before starting the train, show it to the engineer for his guidance; and that during the whole time that the plaintiff was running this train as engineer, McClintock was the conductor of the same train.

On the morning of the sixth of November, 1880, and before the time of leaving of the plaintiff's train from Minneapolis, an order was given by the train dispatcher directing that the train be stopped and held upon the siding at South Minneapolis until the gravel train from Mendota should pass. This order was duly delivered to McClintock, but was not delivered to the plaintiff by him, nor by any one. That McClintock went into the caboose, and that at or soon after the time of starting, upon a signal given by one of the brakemen, as directed by the conductor, the plaintiff started the train. That the conductor fell asleep in the caboose soon after, or about the time of starting. That no halt was made at South Minneapolis, which was one and a half miles from the place of starting, and that plaintiff's train passed Minnehaha station and entered a deep and narrow cut, three or four hundred feet in length, through which the railroad passed at a considerable curve, and down a grade. That the plaintiff discovered the reflection on the bank of the light of the engine of the gravel train approaching from the opposite direction, when it was about one hundred feet from the plaintiff's engine. A collision took place, and the plaintiff was injured.

Upon the trial the defendant introduced as a witness F. C. Allen, (see Bill of Exceptions, p. 28, fol. 58,) who testified that he was the conductor of the gravel train which collided with the plaintiff's train. That his train was then under orders to run to South Minneapolis, regardless of plaintiff's train. That having twelve cars loaded with gravel, his train stalled before reaching the cut where the collision happened. That he then separated his train in the middle, and took six cars on to Minnehaha station, and went back with the engine for the other six cars, and was coming with them through the cut when the collision occurred. That this gravel train had run in the night, about a week, and that when he could reach Minneapolis before the starting of plaintiff's train, he ran without orders, otherwise upon orders, and had met or passed plaintiff's train at some place about every night during the week.

The bill further shows (page 23, fol. 46) that in April, 1880, upon defendant's road, near the city of St. Paul, a freight train, of which McClintock was then conductor, containing live-stock and furniture, took fire and burned to such an extent as to destroy a portion of the freight, and that McClintock was summarily suspended from his functions as conductor by Mr. Case, the assistant superintendent, but was afterwards reinstated.

The bill further states (page 24, fol. 46) that testimony was given tending to show that on the twelfth of October, 1880, when the train was approaching Langdon, it was necessary for McClintock to stop it at the siding at that place, to permit the passage of another regular train coming from the opposite direction. The plaintiff was engineer upon McClintock's train, which was composed of about thirty loaded cars, with caboose; that when the train came within a mile of Langdon plaintiff gave a signal by whistling; that on reaching the station and finding no brakes had been applied, he whistled for brakes four or five times, and still finding no brakes applied, he sent back his fireman, who set from fifteen to eighteen brakes, stopping the train a mile beyond the station.

About the time the train stopped, McClintock, the conductor, came out of the forward caboose, (there being one also at the rear of the train,) and the three brakemen appeared, all having the appearance of having been asleep. That the proper place of the conductor was in the rear caboose. On the same day the plaintiff wrote and mailed to J. O. Pattee, the master mechanic, the following letter:

"Chicago, Milwaukee & St. Paul Railway,
"Hastings Station, Oct. 12, 1880.

"*J. O. Pattee:* The conductor and brakemen of train No. 8, between Hastings and Minneapolis, were fast asleep when we arrived at the mile-board at Langdon. I shut off steam and whistled four times for brakes, and had to send my fireman to brake the train. He set up eighteen brakes before we stopped, and that was one mile through the station.

"Respectfully, Duane O. Ross."

That soon afterwards, and before October 16th, Mr. Pattee passed the letter over to Williams, the train dispatcher, and called his attention to the matter, and that Williams made inquiries about the same matter of the plaintiff. He told him the same facts, and expressed his opinion to Williams that McClintock was not a safe man to run with, and his wish and purpose not to run with him. The letter was passed over by Williams to Underwood, the assistant superintendent.

The plaintiff testified that at the time of his conversation with Williams he also had a conversation with Pattee, and told him that he did not get along well with McClintock, and wished Pattee to give him another run, and that the latter laughed and said, "I would not let a boy beat me out of a job," and said he would make other arrangements—shift him around some other way.

The bill further shows (page 25, fol. 50) that during the night, about four days before the accident, one Oscar Lyke, a locomotive engineer, was ordered by the train dispatcher to follow with his engine plaintiff's train, No. 28, from Minneapolis to St. Paul, and was notified that plaintiff's engine on said train would carry red lights as a signal that an engine was following, and that orders to that effect were, before the plaintiff's train started, given to and received by McClintock; that just about the time plaintiff's train started, Lyke showed these orders to the plaintiff, and inquired if he had been notified thereof by McClintock; that in fact McClintock never showed such order to the plaintiff, but upon being apprised of same by Lyke, plaintiff caused his fireman to get the lights in readiness, and before reaching Fort Snelling hung out said lights, and that when passing Mendota the gravel train stood ready on the switch to move out when the plaintiff's train passed.

Evidence was given tending to show (page 25, fol. 50) that notice of this last neglect of McClintock's was given by Lyke to J. S. Ryan and Mr. Williams, the train dispatchers, and to Mr. Chase, the superintendent, the morning or forenoon before the plaintiff was hurt.

Evidence was also given tending to show (page 25, fol. 51) that McClintock was asleep on the night of the accident, soon after leaving Minneapolis, until the collision took place, and that his habit, as a general thing, when the train arrived at stations, was to be asleep. Evidence was also given tending to show (page 26, fol. 53) that, since the time of the accident, the rule as to giving orders has been changed by the company so as to require them to be given to and receipted by the engineers as well as the conductors.

ARGUMENT.

The judgment in this case should be sustained upon the ground that the plaintiff in error exposed the defendant in error to perils and hazards against which it might have guarded by proper diligence.

Railroad Company v. *Fort*, 17 Wall. 553.
Hugh v. *Railway Co.* 100 U. S. 213.
Wabash Railway Co. v. *McDaniels*, 2 Sup. Ct. Rep. 932.

The liability of the plaintiff in error stands upon each of the following grounds, apparent upon the record:

1. The negligent operation and use by the plaintiff in error of this gravel train, not as one of the instrumentalities of its railroad, but which was employed for other purposes and in a distinct employment from that of the defendant in error, viz., in getting out gravel at Mendota for the purpose of constructing for the plaintiff in error a new line of railroad on the east side of the Mississippi river from St. Paul to Minneapolis.

2. Because the defendant in error was injured through the negligence of McClintock, the conductor.

The liability of the company in this respect stands upon either of two grounds:

a. McClintock was a negligent and unfit person for that position, and the company had notice of it and of specific acts of negligence committed by him.

b. McClintock was not, under the special facts appearing upon the record, the fellow-servant of the defendant in error, and the company is responsible for his negligence in failing to show to the defendant in error the train order or dispatch by which he was ordered to hold his train at South Minneapolis to wait for the gravel train.

I.

It plainly appears that the injury to the defendant in error was in part caused by the negligent operation and use of the gravel train. The plaintiff in error, at the trial, introduced as a witness (page 28, fol. 59) F. C. Allen, "whose testimony tended to show that he was the conductor of the gravel train which collided with the plaintiff's train, causing the accident; that his train was then under orders to run to South Minneapolis regardless of the plaintiff's train; that having twelve cars loaded with gravel, his train stalled before reaching the cut where the collision happened, and that he separated his train in the middle and took six cars to and upon the siding at Minnehaha station and went back with the engine for the other six cars, and was coming with them through the cut when the collision occurred; that said gravel train had run in the night about a week, and that when he could reach Minneapolis before the starting time for plaintiff's train, he ran without orders; otherwise upon orders, and had met or passed plaintiff's train at same place about every night during the week."

It appears (page 22, fol. 43) that "this gravel train was run by the defendant in hauling gravel from a pit near Mendota to Minneapolis in the night, for the construction of a new line of defendant's road then being built to St. Paul and Minneapolis."

It thus appears that this gravel train was so overloaded that it stalled; that its conductor cut it in two, leaving one portion standing on the track, taking the other part to Minnehaha; without sending any dispatch or putting out any signals of the danger of the situation, returned to the portion which he had left standing on the track, and was proceeding up the rock cut when the accident happened. It was the duty of this conductor in such a condition of things to take precautions against collision. It was his duty not to overload his train. The situation which his negligence occasioned was a dangerous and probably an unexpected one, and had he exercised the least care by telegraph from Minnehaha, or putting out signals, this casualty could never have occurred.

We maintain that he was not a fellow-servant of the defendant in error, in any sense which will exonerate the company from responsibility. He was not in the same grade of employment or in the same general employment. He was engaged in constructing a new and independent line of railroad for the plaintiff in error, on the other side of the river, while the defendant in error was engaged in the general operation of the road. Each of these persons was manifestly under the control of different departments of the road.

It is difficult "to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh the conflicting views which prevail in the courts of the several states," but we submit with great confidence that the plaintiff in error and the conductor of the gravel train were not such fellow-servants as will exonerate the company from responsibility in this case.

The defendant in error contracted to assume only the risk of the ordinary hazards of his employment, in which were not included risks of this character.

Randall v. *Balt. & OhioRy. Co.* 3 Sup. Ct. Rep. p. 332, differs very materially in respect to the relations of the employes, and we do not understand it to conflict with our proposition.

Thompson v. *Railway Co.* 14 Fed. Rep. 564.
Drymala v. *Thompson,* 26 Minn. 40.
Flike v. *R. R. Co.* 53 N. Y. 549.
Coombs v. *New Bedford Cordage Co.* 102 Mass. 572.
Laning v. *R. R. Co.* 49 N. Y. 521.
O'Donnell v. *R. R. Co.* 59 Pa. St. 239.
Ryan v. *R. R. Co.* 60 Ill. 171.
Railway Co. v. *Henderson,* 37 Ohio St. 549.
Railway Co. v. *Dunham,* 49 Texas, 181.
Hall v. *Railway Co.* 74 Mo. 298.
Cowles v. *Railroad Co.* 84 N. C. 309.

It is not enough that the injured person and those causing the injury are in the service of the same master; they must actually be engaged upon common work. This is the criterion laid down; and in all the cases in which the master has been held not liable, the servants have clearly been so engaged. In the leading case on the subject, (*Bartonshill Coal Co.* v. *Reid,* 3 Macq. 266,) Lord Cranworth throughout restricts the exception to the case of servants engaged "in a common work," (pages 276, 282,) or in a "common occupation," (page 277,) or of "fellow-workmen," (page 284;) and page 293. He approves of the judgment of the lord president in *Gray* v. *Brassey*, 15 Court of Sess. Cas. (2d S.) 135, as in accordance with the doctrine of the English cases, in which the lord president said he "considered the question to turn on what is to be regarded as common service. It was not enough that the servant injured, and the servant causing the injury, should be servants of the same master; they must be engaged *in the same work.*" The learned lords who took part in *Reid's Case*, 3 Macq. 266, and in *Bartonshill Coal Co.* v. *McGuire*, Id. 300, which was, in effect, the same case, concurred in this view. Thus, Lord Chelmsford, C., (page 307,) after pointing out the difficulty of defining common service or common employment, says: "It is necessary, however, in each particular case, to ascertain whether the servants are fellow-laborers *in the same work.* When servants are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception.". And after stating the facts in *McNaughton* v. *Caledonian Railway Co.* 19 Court of Sess. Cas. (2d S.) 271, LordChelmsford, C., (at page 311,) said that the decision, holding the master liable, might be sustained without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of work, the deceased being a carpenter who was engaged in repairing a railway carriage, and the persons whose negligence caused his death being an engine driver and the person who turned the switches. A review of the English cases will show that, in all instances in which the master has been held responsible, the servants have been, for the time, *engaged on common work, with a common object.*

II.

Whatever may be held as to the preceding proposition, the jury found specially (page 14, fol. 33) as follows:

"We, the jury, have considered the following questions submitted by the court, to-wit: *First*, was McClintock a person of negligent habits and character? and we answer yes; *second*, if so, had the defendant notice of the negligent character of said conductor long enough before the accident to have discharged him prior thereto? and we answer yes."

The bill of exceptions shows that this special verdict was found upon testimony of the most convincing character, of repeated acts of negligence by McClintock, and, in particular, of his habit of going asleep as soon as his train began to move; and that the company had notice from the defendant in error and others of all this, cannot be seriously controverted. The liability of the company in such cases is established by this court by the *Wabash Railway Company* v. *McDaniels*, 2 Sup. Ct. Rep. p. 932, and the cases therein cited and approved.

III.

Irrespective of the liability of the company arising out of its knowledge of McClintock's general and habitual negligence and incompetency, it is liable upon the single ground that McClintock failed to show to the defendant in error the order directing the train to be held at South Minneapolis to wait for the gravel train. By the rules of the company, set up in the complaint (Page 4, Fol. 9) and not denied by the answer, it was required that "conductors must in all cases, while running by telegraph and special orders, show the same to the engineer of their train before leaving the station where the orders are received,—the engineer must read and understand the order before leaving the station. The conductor will have charge and control of the train and of all persons employed on it, and is responsible for its movements while on the road, except where his directions conflict with these regulations, or involve any risk or hazard, in which case the engineer will also be held responsible."

It was the duty of this company not to expose the defendant in error to any extraordinary peril, and to so direct the departure and running of his train as not to bring him into collision with other trains, and particularly those of the character of this gravel train. It is a primary duty which cannot be delegated so as to exonerate the company from responsibility.

If it chose to make a conductor or any other person its agent in performing its duty, the act or negligence of the conductor was the act and negligence of the company.

Booth v. *R. R. Co.* 73 N. Y. 38.

The rule expressly gave him charge and control of the train, and of all persons on it. It imposed upon him the duty, when running by telegraph and special orders, of showing the same to the defendant in error. The engineer worked "under the orders or control" of the conductor.

Randall v. *Balt. & Ohio Ry. Co.* 3 Sup. Ct. Rep. 326, opinion. See, also, cases cited *ante*, point 1.

IV.

To consider the assignment of errors (page 32, fol. 70) in their order:

The court did not err in overruling the objection to the question to the witness Duane O. Ross, "What did you tell Mr. Pattee on that occasion?" Mr. Pattee was Mr. Ross' immediate superior; was the master mechanic, having the right to hire and discharge engineers and firemen.

It appears (page 24, fol. 48 *et seq.*) that this conversation was in connection with the letter which Ross had previously written to Mr. Pattee, informing him that McClintock and the brakemen were asleep when the train arrived at Langdon, where this train was to stop for another train, whereby Ross was obliged to send his fireman to brake the train, and did not succeed in stopping it until it had run a mile beyond the station. Mr. Pattee had passed this letter over to Mr. Williams, the train dispatcher, who had inquired of the matter of the plaintiff, who had told him the same facts, and that McClintock was not a safe man to run with; and Williams had passed over the letter to Underwood, the assistant superintendent. The conversation with

Mr. Pattee was in the presence of Mr. Williams, and in that conversation Pattee promised to make different arrangements some way, and shift the defendant in error around in some other way. This testimony was proper to prove notice to the company, and its promise to remove the cause of complaint.

The court was correct in sustaining the following question to James S. Burgett: "What were McClintock's habits as to going asleep or being asleep when you arrived at stations?" This was manifestly competent testimony to prove the fact that McClintock was habitually negligent.

The court was correct in sustaining the following questions to the witness Pryor: "Do you know whether it was the custom of your railroads to require orders for the trains to be addressed to both conductors and engineers?" The question in itself was a competent one, and the answer of the witness that "different roads have different rules; I know roads where they address directions directly to the engineer, and also to the conductor," did not establish, or tend to establish, any custom one way or the other, and could work no injury.

The court was correct in allowing the following question to the same witness, "Which do you consider the safest and most prudent?" as the answer tended to show that the rule by which the orders are directed and delivered to both the conductor and engineer is safer than the one which sends the order to the engineer through the conductor.

The court was correct in allowing the following question to the same witness: "But the new system prevails in your jurisdiction, don't it?" As his answer shows (page 26, fol. 53) that on November 9, 1880, three days after this accident, the former rule was changed, and one established requiring such orders to be given and receipted by engineers as well as conductors, this testimony was competent as tending to show that the former rule was a dangerous one, and that its existence imposed greater care upon the company in running its trains under circumstances where casualties of this character could possibly occur.

The court was correct in refusing the defendant's motion, made when plaintiff rested, that it instruct the jury to return a verdict for the defendant. The bill of exceptions does not set out the entire evidence in the case, and this exception cannot be now considered.

Upon the bill itself it appears that there was ample testimony to go to the jury. Besides, the defendant, after this motion was denied, did not rest the case on the testimony already in, and introduce none on its own behalf, but went on with its defense, putting in testimony of its own, and did not renew its motion upon the whole evidence. Under such circumstances this exception cannot be considered.

Grand Trunk Ry. Co. v. *Cummings*, 2 Sup. Ct. Rep. p. 493.

The court was correct in sustaining the plaintiff's objection to the question asked the witness Underwood: "Did that investigation develop the fact as to who was to blame for running by Langdon?" Mr. Underwood's opinion upon that subject was not competent. Besides, the bill does not show what his answer would have been, or what proof it was expected to elicit by the question. The bill should have shown what the excluded testimony would have been.

State v. *Staley*, 14 Minn. 105.
Hollister v. *Raynor*, 1 Ohio St. 9.
May v. *Farril*, 22 Texas, 340.
Street v. *Bryan*, 65 N. C. 619.
O. & M. Ry. Co. v. *Rowland*, 51 Ind. 285.

The court was correct in sustaining the plaintiff's objection to the question asked the witness Underwood: "After making the investigation, was the action of the company in accordance with such recommendation as you have made?" The bill (page 28, fol. 57) does not show what it was proposed to prove by the answer to this question, what the recommendation was, or what the action of the company was.

The court was correct in charging the jury that "if the company sees fit to place one of its employes under the control and direction of another, then the two are not fellow-servants engaged in the same common employment within the rule of law within which I am speaking." Its instruction is correct as a general principle.

Ross v. *C., M. & St. P. Ry. Co.* 2 McCrary, p. 235, and note, p. 243, and cases cited *ante*.

At all events, it was the correct rule in this case, taken in connection with the remainder of the charge of the court. This instruction was manifestly given upon that branch of the case under which it is maintained that the negligence of McClintock in failing to show the order to the engineer was the negligence of the company; and even if it should be held erroneous, the error will not avail the plaintiff in error, for the reason that the special verdict of the jury (page 14) that McClintock was a person of negligent habits and character, and the defendant had notice of this long enough before the accident to have discharged him, places its liability upon other grounds which are not at all affected by this portion of the charge; and it appears from the charge of the court (page 17) that these special findings were required by the court of its own motion. The court say: "Upon this branch of the case I shall ask you to find specially by answering an interrogatory which I have prepared and will submit to you. I will ask you these specially upon this branch of the case: whether McClintock was a negligent person, unfit person, and whether the company had notice. It may be necessary, in view of possible further proceedings in this case, that we should have your finding upon that specific fact." These special findings render immaterial the question whether McClintock and the defendant in error were fellow-servants.

Rountree v. *Smith*, 2 Sup. Ct. Rep. p. 631, opinion.

There is no error in the eleventh assignment, that the court erred in charging the jury in respect to the duty of delivering or showing the running orders to the engineer; the conductor was the superior of the engineer, etc.

If the court erred in this, the verdict must, as we have observed, be sustained upon the special findings, which stand upon other grounds than those considered considered in this portion of the charge.

The same remarks are applicable to the twelfth assignment of error.

In regard to the thirteenth assignment of error, the charge expressed the true rule upon this subject.

R. R. Co. v. *Fort*, 17 Wall 553.
Hough v. *R. R. Co.* 100 U. S. 213.
Wabash Ry. Co. v. *McDaniels*, 2 Sup. Ct. Rep. 932.

The court was correct in charging the jury that "if it be true that he communicated the fact by letter to the master mechanic, and the master mechanic laid it before the assistant superintendent, who acted upon it so far as to institute an investigation concerning it, that was sufficient notice to the company. The master mechanic was the plaintiff's immediate superior." (Page 22, fol. 41.) It was the duty of the defendant in error to report to him, and it was wholly immaterial how the notice of McClintock's incompetency was communicated to the plaintiff in error; and that it was communicated in several instances to the master mechanic, to the train dispatcher, and to two assistant superintendents, fully appears. (Pages 24 and 25.)

The court was correct in charging the jury that "the company cannot protect itself from the consequences of the negligence of the conductor, after notice of his negligent character, by showing that they believed him to be competent and diligent, nor by showing that they instituted an investigation which resulted in his acquittal on the charge of incompetency and negligence which were made against him." The rule implied in the exception would substitute the adjudications of the company for those of the courts. If an employe is negligent, and the master has notice of it, he takes the responsibility of continuing him; or, as expressed by the court in the sixteenth assignment of error, "when the company was notified by another employe that this conductor was a negligent and incompetent official, it continued him at its own risk, notwithstanding the fact that he was believed by the company to be competent; they were bound, in other words, by the fact, whatever the fact might be. They were put upon the inquiry, and, as to the rights of other employes, they cannot shield themselves upon the ground that they did not believe in the truth of the charges that were made against him."

Wood, Master & Servant, sect. 430.

Whatever the rule may be, these portions of the charge relate only to the testimony of Assistant Superintendent Case (page 28, fol. 57) as to McClintock's negligence when his train took fire, and that he suspended McClintock, investigated the matter, exonerated and reinstated him, and they have no reference to the other acts of negligence and incompetency; namely, the negligence at Langdon, (page 24,) and the negligent failure to deliver the order to carry the red lights, (page 25).

In regard to the seventeenth and eighteenth assignments of error, the court, in the portion of the charge excepted to, laid down the true rules upon this subject. The court did not err in the remarks stated in the nineteenth assignment of error: "The principle is well established that a court may give their opinion on the evidence to the jury, being careful to distinguish between matters of law and matters of opinion in regards to the facts. When a matter of law is given by the court to the jury, it should be considered as conclusive; but a mere matter of opinion as to the facts will only have such influence on the jury as they may think it is entitled to."

Per Cur. Games v. *Stiles*, 14 Peter, 322, 327, opinion.

The entire charge must be taken together, and we submit that, so taken, it presented the law of this case correctly to the jury.

We have observed that the liability of this company stands upon several different and independent grounds, and even if the court did err in its definition of the relations of McClintock to the plaintiff, still the special verdict that McClintock was a negligent and unfit person, and that the company knew it in time to discharge him before this casualty, renders such errors immaterial.

Judgment should be affirmed.

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